

# Indiana Law Review

Volume 37 No. 2 2004

# Indiana Law Review

Volume 37 2003-2004

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and business Offices are located at:

*Indiana Law Review*
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

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POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.

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# Indiana Law Review

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# LECTURE

## DIVERSITY AND LEGAL EDUCATION*

DENNIS W. ARCHER**

Thank you for inviting me to participate in this distinguished lecture series. And thank you, Jim White, for your remarkable service to the American Bar Association. As most of you know, Jim was a consultant to the ABA Section of Legal Education and Admissions to the Bar for twenty-six years. As you might imagine, a lot has happened in legal education during that time; in fact, we at the ABA credit Jim with being instrumental to many of the things that make legal education what it is today. Your service to the profession has been invaluable.

I wanted to talk today about some issues that are close to my heart, dealing with the legal profession and where we are today.

First, I must begin by saying how very elated I was when the Supreme Court this summer decided in favor of the University of Michigan Law School's admissions policy. It was a great statement from the Court, and one which I believe speaks to who we are as a country. I also believe it has profound implications for legal education and the future of the profession.

Without question, the American Bar Association applauds the upholding of Michigan Law School's flexible affirmative action approach that ensures the effective participation by all segments of society.

The ABA had filed an amicus brief in the Michigan case. In fact, some sixty-eight corporations, including some of the largest in the nation—General Motors, Microsoft, Nike—filed supportive briefs. The four military academies filed amicii as well, stating that diversity is essential to the nation's officer corps. Retired military officers filed a brief. Twenty-two states filed—more than 100 universities—psychologists—labor unions—civil rights groups. One brief, supporting the university, was filed by nearly 14,000 law students.

As I said, the decision was momentous—and not only for the legal profession, which of course is the immediate stakeholder, but for the future of affirmative action in this country. It is the first time the high Court has taken up the question of the constitutionality of affirmative action as a factor in higher education admissions decisions since the Bakke decision twenty-five years ago.

We at the ABA feel strongly that race can and *should* be taken into consideration in law school admissions. We *strongly* believe that the full participation of all racial and ethnic groups in the legal profession is a compelling

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* This is a revised version of the third James P. White Lecture on Legal Education delivered at the Indiana University School of Law—Indianapolis on October 27, 2003.

** President, American Bar Association.

state interest. It preserves the legitimacy of our legal system and safeguards the integrity of our democratic government. We are not alone in our beliefs. As I said, more than 100 briefs were filed in the case—most of which agreed with us.

I was there on April 1 when the cases were heard. I was not alone there either. The courtroom was packed. It was impossible to get a seat. Thousands of students, civil rights leaders, and others were outside. The lawyers' lounge was filled to overflow; more than 100 reporters were in the gallery.

The ABA's position is that law schools should demonstrate "commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably ethnic and racial minorities, which have been victims of discrimination in various forms." That quote is from our Standards for Approval of Law Schools. In her opinion in the Michigan case, Justice O'Connor wrote, "Effective participation by members of all racial and ethnic groups in the civic life of our nation is essential if the dream of one nation, indivisible, is to be realized."

She also wrote that she expected that "racial preferences will no longer be necessary in 25 years." In August, at our annual meeting in San Francisco, we did a poll to see what the American people thought on that question. In fact, 70% agreed with the Madame Justice, saying they do not believe that, twenty-five years from now, we should need to take race into account in university admissions in order to achieve diversity in higher education. I think they are right.

Part of the *reason* they are right is the changing demographics of this country. Over two decades ago, social scientists and demographers began writing about the "browning of America;" the fact that the majority population in the United States in the year 2056 will be people of color. It follows that more law students, and more lawyers, will be from minority populations. Admissions policies will change as race becomes less and less a factor in our everyday lives.

But admissions decisions are only part of the equation that determines who can attend law school, and who cannot. Another factor that is becoming more and more crucial every year is cost. In the short span from 1992 to 2002, tuition cost for law students in public schools has risen 134% for residents and 100% for non-residents. For those students in private schools, the cost has gone up by 76%. As of the 1999-2000 academic year, fully 87% of law students had to borrow to finance their education.

And these students are taking on enormous debt burden. The ABA estimates that the median amount borrowed by 2002 private law school graduates was $70,147. A private lender estimated the median law school debt for 2001 graduates even higher—$84,400.

That clearly is an onerous burden for any law student. But a survey in my own state of Michigan reported in 2000 documented that the burden of debt falls even more heavily on Hispanic and African American students than on Caucasians. Caucasian law school graduates in Michigan were graduating with a median total debt of just under $50,000. African American graduates in Michigan faced a debt load of $60,000, while Hispanics finished law school with $62,000 in loans to repay. That stands to reason, because Black and Hispanic students are twice as likely as others in law school to come from the lowest

socioeconomic groups.

Anecdotally, we at the ABA are seeing the results of this in the applicants for our legal education opportunity scholarship program. Among those applicants, from the time the program started under my predecessor, Bill Paul, loans have always been a part of the financial package. But now, loans represent a higher proportion of their financing, and for many of the applicants, it is nearly all.

Assuming the very best for these students, their career choices will be limited by their debt. They will only be able to consider positions in corporate service law firms paying the highest available salaries—and that assumes those firms will have jobs for them. That means that fewer lawyers of color will be able to return to their communities where they can succeed serving middle-class Americans, and serving as role models for children of color to aspire to practice law.

Assuming the worst, we are, by allowing law student debt to continue to grow, pushing students from every demographic to the brink of bankruptcy, and in some cases, over the edge. To the extent law student debt impacts students of color more heavily than white students, we are pushing students of color into bankruptcy after they have overcome unbelievable challenges just to get into and complete law school.

But realistically, not all of them will find jobs paying sufficient amounts to service their debt. We face the spectre of defaults on student loans and possible bankruptcies for these newly minted lawyers standing at the brink of their careers in law, in a profession that desperately needs them.

And make no mistake about it—the legal profession does need more lawyers of color.

Any profession that intends to do business in this century must reflect racial and ethnic diversity. The client base, both domestically and in world markets, demands it.

Corporate America has come to understand this much more quickly than many of us in the legal profession. Corporations have developed vendor and employee affirmative action programs and changed the content of their advertising to appeal to broader audiences and constituencies. They know that their bottom line will be affected, if they do not reach out to reflect the ever-changing consumer demographic.

The American Bar Association estimates that there are about 1,050,000 lawyers in the United States. (Fortunately, not all of them practice.) Presently, over 89% of the legal profession and 80% of enrolled law school students are white. Lawyers of color represent only just over 10% of the profession. They include over 19% of recent graduates, but not quite 4% of partners in the nation's major law firms. While there has been improvement in the numbers of lawyers of color since the 1990s, they remain woefully under-represented in the legal profession. Clearly, we have failed to promote diversity throughout our profession.

We need more lawyers of color. We need them on our courts in all jurisdictions. We need more judicial law clerks for judges and justices. This is very important. For recent law school graduates, serving as a judicial law clerk can significantly advance their career opportunities. Former law clerks generally

have an advantage when pursuing careers in academia, in government as high level appointees, as litigators in prestigious areas of the private sector, and in securing appointments to the bench. Without fair access to judicial clerkships, both law schools and their graduates lose opportunities.

I want to express my appreciation for the work of the ABA Minority Judicial Clerkship program, led by one of your very own—Indiana Supreme Court Justice Frank Sullivan. Thanks to his great work, and that of the members of the ABA Judicial Division and ABA Commission on Racial and Ethnic Diversity, more law students of color have the opportunity to work and build relationships with judges.

We need more aggressive minority recruiting in law schools, and then we need to address the reasons why 10% of those minority students who are accepted into law school never matriculate, and 20% of those who actually do enroll drop out without finishing. We need to address issues like increasing faculty diversity, so that minority students do not feel isolated, and so that law school culture fosters understanding and experiences that promote growth for everyone. We can't afford to lose the broad range of talent, perspective and experience that people of diverse backgrounds can bring to our profession.

The ABA pledges to continue working with law schools across this nation to help them sustain and increase diverse law school enrollment in compliance with the University of Michigan ruling.

* * *

As you may know, I am the 127th President of the American Bar Association—and the first president of color. You may also know that the association did not admit people like me until 1943. Our association missed out on the great contributions we might have had from some of the legal scholars of an entire generation: William Hastie, Leon Higgenbotham, Charles Hamilton Houston, Damon Keith, Justice Thurgood Marshall and others. And we missed out on the contributions of committed and dedicated and creative people who never had the opportunity to become lawyers. I think about how far ahead we would be now, if they could have been involved in the great debates that took place at the ABA. They would have contributed—and moved forward—our dialogue on race relations.

But this is a new day.

Coming right behind me is another president of color, Robert Grey, Jr. Together we make a major statement about the American Bar Association's commitment to serve the public good, to help improve the administration of justice, and to provide access and opportunities to those members of our society who are or have been denied an equal opportunity to compete.

* * *

I wanted to mention a few things that I am focusing on during my year as president of the ABA. Last week, I hosted a conference in Washington, D.C. to look at increasing diversity in the profession. We had top-level speakers who

addressed issues of establishing a pipeline for lawyers of color. Educators talked about how to interest more students of color in the law; how to get to kids in elementary and high school, to let them know what's great about being a lawyer. We also focused on what happens after law school; how do we open the pipeline for lawyers of color to get into good firms, corporate counsel positions, law school deanships and other areas. We talked about opening doors and mentoring for lawyers of color at all levels.

I have appointed an ABA Commission chaired by Harvard Professor Charles Ogletree, Jr. to focus on the fiftieth anniversary of *Brown v. Board of Education*. The Commission is reviewing the current state of *Brown's* goals and its effect on civil rights; it will also honor the heroes of this historic decision. Our Public Education Division is working with high schools across the country, to create dialogues on *Brown v. Board* so that young people can learn about what the decision means, and how it is at work today.

I will be holding a summit in May to look at the advancement of women, and women of color, into the top ranks of organizations and law firms. We will discuss how to get beyond the glass ceiling, and the work that needs to continue so that women reach the highest levels of the legal and other professions.

As the world's largest professional organization, representing the nation's lawyers, we are always working to improve the administration of justice and to ensure that our rights are upheld and protected. I could talk about other programs we have underway, but I would be here all night. And I would rather hear from you, if you have any questions about anything I have said or what the ABA is doing. So I will open the floor now to your questions.

Thank you.

# Indiana Law Review

**Volume 37** **2004** **Number 2**

# ARTICLES

## FEDERALISM RE-CONSTRUCTED: THE ELEVENTH AMENDMENT'S ILLOGICAL IMPACT ON CONGRESS' POWER

MARCIA L. MCCORMICK*

### INTRODUCTION

The last decade has seen a transformation in the way the Supreme Court views the balance of power between the federal government and the states. The Eleventh Amendment to the United States Constitution and principles of state sovereign immunity limit the power of the federal judiciary and protect the states from suit by individuals in federal court. The Supreme Court has read this protection more and more broadly. At the same time, the Court has been reading Congress' power to enact certain kinds of protective legislation more and more narrowly. These two areas of jurisprudence have converged to limit the power of Congress to provide remedies for civil rights violations by the states.

This convergence is troubling for a number of reasons both practical[1] and jurisprudential.[2] But few scholars have recognized the danger that the Court's jurisprudence poses to Congress' general ability to protect individual liberty and equality. Not only has the Court limited the power of Congress under the guise of limiting the power of the judicial branch,[3] but it also has restricted the power

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1. Practical concerns include how to enforce the myriad of regulatory laws when states act just like private entities, for example as employers, creditors, or patent infringers. *E.g.*, Mark D. Shaffer, *Reining in the Rehnquist Court's Expansion of State Sovereign Immunity: A Market Participant Exception*, 23 WHITTIER L. REV. 1011 (2002).

2. At the time these laws were enacted Congress and the states believed that Congress was validly abrogating the states' immunity and so complied with the rules for enacting legislation. To invalidate that legislation now seems unprincipled. Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 84 (2001). Moreover, the analysis adopted by the Court treats Congress as an inferior tribunal and not as a coequal branch of government with its own powers under the Constitution. *Id.* at 84-86.

3. The Eleventh Amendment addresses the power of the federal judiciary over the states, while the Tenth Amendment is generally construed to address the power of the legislative branch

of Congress to enact lasting civil rights legislation. In a line of cases, the Court has systematically violated longstanding principles of separation of powers and denigrated the norms of national citizenship, equality, and liberty, which are central to our core constitutional values.[4]

Under the law as it stands, Congress can pass laws to protect citizens from a broad range of actions by the states under several different parts of the Constitution, but it can provide a private right of action for damages against states only under the Enforcement Clause of the Fourteenth Amendment. While it is not the only remedy in the grand scheme of things, a private right of action for money damages is one of the most effective deterrents to illegal conduct because it decentralizes enforcement power to individuals and because money, by its nature, is a limited resource.[5]

Enforcement is the real issue here. Section 5 of the Fourteenth Amendment allows Congress to enforce the equal protection and due process guarantees of that amendment. The self-executing portion of the Fourteenth Amendment has been interpreted to prohibit the states from only the most egregious forms of discrimination, and to prohibit the states from depriving individuals of a limited category of fundamental rights. Outside of this limited arena, the Fourteenth Amendment has been interpreted to allow a broad range of conduct that perpetuates subordination of particular classes and a broad range of state regulation of individual rights. While the self-executing part of the amendment offers only limited protection to individuals, the Court has consistently rejected the proposition that Congress' power to enforce the amendment is limited to enacting legislation that mirrors the Fourteenth Amendment. Legislation under the Fourteenth Amendment can be broader than the amendment itself and be valid as long as it works to *remedy* past unconstitutional discrimination or

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to encroach upon the states. *See* U.S. CONST. amend. X; U.S. CONST. amend. XI.

4. *See* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1281 (2001) (arguing that equality is a core constitutional value). While not every scholar agrees on the scope of national citizenship, under the federalist view of the Constitution, national citizenship has always been a core constitutional value, which was merely "perfected" by the Reconstruction Amendments. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439-62 (1987).

5. The combination is particularly effective because even defending a number of suits that are ultimately won by the state takes a significant portion of a state's resources. Other remedies are less effective because there is less chance of enforcement and less harm from enforcement. For example, prospective injunctive relief provides no punishment for violations of the law that have already occurred, so there is no incentive for a state to comply with a statute that provides only that relief until the state is ordered to do so by a court. A suit by the United States which could recover damages or result in a fine would usually be brought only in the most egregious circumstances, or where sufficient political will otherwise exists, because of the limited resources of the federal government. Moreover, private suits for money damages are the only remedy designed to fully compensate victims of illegal action for the harm they have suffered. Thus, providing a private right for damages maximizes a statute's enforcement power.

infringement upon rights or to *deter* future constitutional violations.[6]

While remedy and deterrence would appear to give Congress significant power to enact legislation under the Fourteenth Amendment,[7] and thus to make states amenable to suits for damages, in recent years the Court has focused on remedy to the exclusion of deterrence. In other words, the Court has allowed Congress to prohibit only those actions that the states have widely engaged in and which violate the self-executing portion of the Fourteenth Amendment. Congress may not legislate to prevent states from using what appear to be constitutional means to hide discriminatory acts.[8]

That solely remedial focus poses a problem: if a statute is a valid exercise of the Fourteenth Amendment only when it addresses an *existing* constitutional evil, its validity decreases over time as the constitutional evil ceases to exist and its past existence becomes more distant. Focusing on remedy alone leads to a result in which the validity of legislation under the Fourteenth Amendment may expire once enough time has passed during which states actually follow the law and refrain from violating the Fourteenth Amendment.[9] It is paradoxical to think

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6. City of Boerne v. Flores, 521 U.S. 507, 517-18 (1997). While "deter" is the term the Court has always used, it is possible that it has always meant that Congress does not really have power under the Fourteenth Amendment to deter possible violations, but only violations like those that have already occurred. The Court in the *Civil Rights Cases*, 109 U.S. 3, 18 (1883), indicated that only corrective legislation was valid under the Fourteenth Amendment. The Court used "corrective" broadly to mean aimed at particular state action, which, at least in theory, could mean particular potential state action. However, the term "corrective" implies an actual thing to be corrected. The *Civil Rights Cases* have been criticized as constituting an unnecessarily narrow reading of the Fourteenth Amendment. Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 433-35 (2003).

7. Professor Tribe calls the apparent breadth of these dual goals misleading, noting that recently Section 5 measures have "been saddled with something between intermediate and strict scrutiny, effectuating what can only be understood as a substantial, albeit not conclusive, presumption of unconstitutionality." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 959 (3d ed. 2000).

8. In *Board of Trustees of the University of Alabama v. Garrett*, for example, the Court scrutinized the legislative record of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2002), to determine whether there was an existing constitutional evil (rather than a potential constitutional evil) that Congress could have addressed through the legislation it enacted. 531 U.S. 356, 368 (2001) ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.").

9. Daniel Meltzer recognized the possibility that the Court's jurisprudence could lead to this result, but did not discuss it in depth. Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1350 (2001). Offering a similar insight, Justice Jackson, in a memorandum on *Brown v. Board of Education*, argued that statutes could become unconstitutional based on a change in circumstances wrought by time. Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and* Brown, 72 TEMP. L. REV. 51, 104 (1999) (citing Memorandum from Robert H.

that legislation is only constitutionally valid while people are actively engaging in conduct it prohibits. And while the Court could find that legislation is generally valid if it was valid at the time it was enacted, the Court may be compelled by its jurisprudence to find that the Constitution requires an expiration date to be built in to all Fourteenth Amendment legislation for it to be enforceable.[10]

This Article further illustrates this critique and proposes a structure for analysis that would resolve the danger. Part I of this Article briefly describes the state-immunity jurisprudence of the Court.[11] Part II focuses on the Court's treatment of legislation passed under the Fourteenth Amendment.[12] Part III describes the convergence of the two lines of cases and the problems this convergence poses for Congress as it considers ways to protect national citizenship and promote equality and liberty.[13] Finally, Part IV suggests ways in which the Court should consider deterrence and prevention in its analysis.[14]

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Jackson on *Brown v. Board of Education* at 22 (Mar. 15, 1954) (on file with Library of Congress, Jackson files, box 184)).

10. When reviewing the constitutionality of legislation, the Court is not restricted to an evaluation of the validity of the legislation at the time it was enacted. "Interestingly, there is near unanimity among courts and commentators that an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid" due, presumably, to a change in the underlying legislative facts. Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, 373 n.63 (1999) (citing William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1915, 1908-17 (1993) (discussing the revival of statutes found unconstitutional when a change in the law made them constitutional)).

Treanor and Sperling suggest that revival is not affected by the grounds on which the law was found to be unconstitutional. Treanor & Sperling, *supra*, at 1921-22 (considering the effect of the Court's decision that Congress has the power to enact civil rights laws that prohibit private parties from discriminating on the basis of race on the *Civil Rights Cases* in which Congress was found to lack that power). However, they argue that automatic revival should not be allowed when a statute is found constitutional because of a change in "material societal facts." *Id.* at 1933-34. This argument is based in part on the Court's decision in *Newberry v. United States*, in which the Court stated that when Congress lacked the power to enact legislation, the subsequent enactment of a constitutional amendment granting that power could not revive the statute that had been void when enacted. *Id.* at 1934 (citing *Newberry*, 256 U.S. 234, 254 (1921)).

There is a difference, however, between the act of amending the Constitution to grant a power and a decision by the Court that it was wrong about the lack of power in the first place. The amendment to the Constitution is a popular acknowledgement that Congress did indeed lack the power, while the Court's decision presupposes that Congress actually had the power all along.

11. *See infra* notes 15-60 and accompanying text.

12. *See infra* notes 61-76 and accompanying text.

13. *See infra* notes 77-145 and accompanying text.

14. *See infra* notes 146-54 and accompanying text.

## I. THE SUPREME COURT'S STATE IMMUNITY JURISPRUDENCE

Scholars disagree over whether state immunity from suit in federal court was part of the constitutional design.[15] The Constitution itself does not address whether non-consenting states will be subject to suit in federal courts. Article III does say that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties [and]. . . to Controversies . . . between a State and Citizens of another State . . . ."[16] Based on this language, generally creating diversity jurisdiction, the Court in *Chisholm v. Georgia* determined that a citizen of South Carolina could sue the State of Georgia for money damages despite Georgia's claim that it was immune from suit in federal court.[17]

The reaction to *Chisholm* was immediate and strong, and resulted in the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[18]

On its face, this amendment appears to prohibit federal courts from interpreting the Constitution to allow common law suits brought against a state by foreign citizens. It does not by its terms provide that states shall be immune from suits arising under the Constitution, federal law, or treaties, rather than the common law. Nor does it provide immunity from any type of suits brought by the state's own citizens. Thus, the Eleventh Amendment itself does not appear to shed much light on whether states have general immunity from suit in federal

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15. Some of the framers and their colleagues vocal in the state ratification debates believed that states would be amenable to suit in federal court. *See* Seminole Tribe v. Florida, 517 U.S. 44, 142-50 (1996) (Souter, J., dissenting) (detailing this history); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1207-09 (2001) (analyzing the historical commentary); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) (concluding after exhaustive historical research that the Eleventh Amendment was intended to insulate the states from suit only for obligations arising under the Articles of Confederation and not from prospective enforcement of constitutionally-enacted federal laws).

16. U.S. CONST. art. III, § 2, cl. 1.

17. 2 U.S. (2 Dall.) 419, 450-53 (Blair, J.); *Id.* at 453-58 (Wilson, J.); *id.* at 466-72 (Cushing, J.); *id.* at 472-79 (Jay, J.). Three Justices believed that Article III explicitly authorized the suit, *id.* at 450-53 (Blair, J.), *id.* at 466-69 (Cushing, J.), *id.* at 472-79 (Jay, J.), and one of these plus a fourth also thought that state immunity from suit in federal court would be incompatible with popular sovereignty, *id.* at 472-79 (Jay, J.), *id.* at 453-58 (Wilson, J.). Only one Justice dissented, primarily on statutory grounds, but in part on the ground that when the Constitution was ratified, no state permitted a compulsory suit for recovery of money against it, *id.* at 434-35, 449-50 (Iredell, J.). Of course, the states had not existed as "sovereigns" for very long, and the colonies did not have immunity from suit. Alden v. Maine, 527 U.S. 706, 764 (1999) (Souter, J., dissenting) (citing 1 J. STORY, COMMENTARIES ON THE CONSTITUTION § 207, at 149 (5th ed. 1891)).

18. U.S. CONST. amend. XI.

court.[19] Over time, however, the Court has found that states are generally immune from all suits brought by individuals and that this immunity is part of the original constitutional design.[20] While it took a substantial period of time for the Court to adopt this understanding, it took only two cases to cement the adoption: *Hans v. Louisiana*,[21] decided in 1890, and *Seminole Tribe v. Florida*,[22] decided over a century later.

Between *Chisholm* and the Civil War, there were no notable developments in this area. After the Civil War, the Court decided a number of cases involving suits against state officers, which like *Chisholm*, were brought to recover debts states did not want to pay.[23] Unlike *Chisholm*, these cases were brought as federal question cases, alleging that the states were impairing the obligation of contracts in violation of the Contracts Clause of the Constitution.[24] The Court found that the real defendants were the states, not the officers named, and the cases could not be maintained under the Eleventh Amendment. The Court did not consider whether the fact that the actions were brought as federal question cases rather than diversity cases would change the outcome.[25]

Despite the fact that the Court had not considered the impact that the source of its jurisdiction might have, the Court in *Hans* interpreted these cases as standing for the proposition that regardless of the source of jurisdiction, whether federal question or diversity, the Eleventh Amendment barred suits against states in federal court.[26] *Hans* involved a Louisiana citizen who sued the State of

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19. Justice Brennan, for example, believed that the states surrendered any immunity to suit in federal courts by joining the United States, at least to the extent that the Constitution they ratified gave Congress specific powers. *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 457-58 (1976) (Brennan, J., concurring).

Similarly, Professor Amar has argued that the amendment merely removed two categories of diverse party jurisdiction so that the party alignments specified by the Eleventh Amendment would no longer provide independent grounds for jurisdiction. Amar, *supra* note 4, at 1474-75.

20. Justice Stevens, however, believes that the amendment means only what it says and that any notion of general state immunity from suit in federal court is judicially created common law, which can be abrogated by Congress or altered by the Court. *E.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 23-24 (1989) (Stevens, J., concurring).

21. 134 U.S. 1 (1890).

22. 517 U.S. 44 (1996).

23. *See, e.g.*, *In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1883).

24. U.S. CONST. art. I, § 10. Part of the delay is undoubtedly due to the fact that the lower federal courts did not have general federal question jurisdiction until 1875. *See* 18 Stat. 470.

25. In fact, although in *Ayers* the Court acknowledged that the plaintiffs were alleging violations of the United States Constitution, the Court's discussion was framed as if the case was solely for breach of contract. *See Ayers*, 123 U.S. at 502-04. The Court implied that the case did not arise under the Constitution of the United States for jurisdictional purposes, because the Contracts Clause did not give individuals rights, and any benefit to the plaintiffs from the Contracts Clause was incidental. *Id.* at 504.

26. 134 U.S. at 10. In reaching this decision, the Court failed to consider its holding in

Louisiana to recover on some war bonds.[27] Hans alleged that when Louisiana legislatively disclaimed its obligation on the bonds, it impaired its obligation of contract in violation of the Contracts Clause of the Constitution.[28] The state argued that the Court lacked jurisdiction over it because it was immune from suit without its consent.[29] The Court agreed.[30] It noted that the language of the Eleventh Amendment concerned only suits brought by outsiders, but that the logic behind the amendment could not have countenanced treating citizens of the state differently than non-citizens.[31] Thus, the Court held that the Eleventh Amendment barred suits by all individuals against states in federal court.[32]

At the same time that the line of cases from *Chisholm* to *Hans*, restricting suits against the states, was developing, another line of cases was developing that allowed at least some suits to be brought against state officers, even if the effect of the resulting order would be the same as a suit against the state itself.[33] In *Osborn v. Bank of the United States*,[34] for example, the Bank of the United States, considered a private party, sued a state tax official for seizing bank funds.[35] The official objected that the suit was really one against the state and therefore barred by the Eleventh Amendment, but the Court disagreed, and found that the real defendant should be considered whatever defendant was named in the record.[36]

The holding in *Osborn* was modified a bit by the Court in *Governor of Georgia v. Madrazo*.[37] In *Madrazo*, the Court held that when the party of record was a state official acting legally in an official capacity and when the action was one to recover money from the state treasury or property in state possession, then the action was really one against the state, barred by the Eleventh Amendment.[38]

Following *Osborn* as modified by *Madrazo*, the Court again considered when

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*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 383 (1821), in which it stated that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be parties to that case." The Court considered whether the Eleventh Amendment posed a bar as a separate question. *Id.* at 407. Of course, *Cohens* could also be seen as upholding the power of the Court to review state court decisions, which is how the Court later interpreted it. McKesson Corp. v. Div. of ABT, 496 U.S. 18, 31 (1990).

27. 134 U.S. at 1-2.

28. *Id.* at 1-3.

29. *Id.* at 3.

30. *Id.* at 20.

31. *Id.* at 10-11.

32. *Id.* at 20.

33. *Ex parte* Young, 209 U.S. 123 (1908); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 847-58 (1824).

34. 22 U.S. (9 Wheat.) at 738.

35. *Id.* at 847.

36. *Id.* at 850-58.

37. 26 U.S. (1 Pet.) 110 (1828).

38. *Id.* at 123-24.

a suit could be brought against a state official in *Ex parte Young*.[39] In *Young*, the Court held that the Eleventh Amendment did not bar a suit against a state official seeking to enjoin that official from enforcing an unconstitutional state law.[40] The Court reasoned that a state cannot itself violate the Constitution, and that therefore, any act by a state official to enforce a law that did violate the Constitution lost its character as an act of the state and became an act of the state official in his individual capacity.[41] Thus, while the Court was limiting the rights of individuals to sue states in federal court, it left open a safety valve to allow all suits against state officers in their individual capacities and suits against such officers in their official capacities to enjoin them from enforcing unconstitutional state laws. The Court narrowed the reach of *Ex parte Young* in *Edelman v. Jordan*,[42] by providing that *Young* applied only to suits for prospective injunctive relief.

With these parallel lines of cases establishing that states were immune from certain types of suits in federal court, the focus of the Eleventh Amendment inquiry shifted to whether and how Congress might abrogate that immunity. In *Fitzpatrick v. Bitzer*,[43] the Court analyzed whether Title VII of the Civil Rights Act of 1964[44] validly abrogated states' sovereign immunity. The Court concluded without analysis that Title VII was enacted under Section 5 of the Fourteenth Amendment, and in that context, found that Congress could validly abrogate states' sovereign immunity.[45] The Court rested its decision on the fact that the enactment of the Fourteenth Amendment shifted the balance of power to Congress, away from the states, and the that power to abrogate state sovereign immunity was part of that shift.[46]

In a subsequent case, the Court found that Congress had the power to abrogate state immunity from suit under Article I in *Pennsylvania v. Union Gas Co.*[47] A plurality of the Court stated that the states waived any immunity to suit under Article I when they agreed to be subject to the Constitution which contained Article I.[48] Justice Stevens concurred, adding that any general principle of immunity that exceeded the plain language of the Eleventh Amendment was federal common law, which could be altered by Congress acting under any constitutional provision.[49] Justice White also agreed that Congress could abrogate states' immunity under Article I, but disagreed with the plurality's

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39. 209 U.S. 123 (1908).
40. *Id.* at 152, 159.
41. *Id.* at 159-60.
42. 415 U.S. 651 (1974).
43. 427 U.S. 445 (1976).
44. 42 U.S.C. §§ 2000e through 2000e-17 (2002).
45. 427 U.S. at 453.
46. *Id.* at 453-55.
47. 491 U.S. 1, 14-17 (1989) (Brennan, J.); *id.* at 56-57 (White, J., concurring).
48. *Id.* at 14-17 (Brennan, J.).
49. *Id.* at 24 (Stevens, J., concurring).

reasoning; he did not explain his own reasoning.[50]

Only seven years later, the Court overruled *Union Gas* in *Seminole Tribe v. Florida*.[51] Using a historical analysis the Court found that state immunity from suit in federal court was part of the constitutional design.[52] The Court rejected Justice Brennan's view that the states gave up some of their sovereignty when they ratified the Constitution.[53] The majority held that it was unnecessary for the Constitution to mention immunity because immunity was part of the background.[54] Because the framers took immunity for granted, the majority held, the Constitution's silence on the subject meant that immunity would not disappear after ratification, not that it would not exist. Still, because the Fourteenth Amendment marked a shift in power away from the states and to Congress, Congress could abrogate state sovereign immunity under it.[55] However, Congress did not properly have the power to abrogate state sovereign immunity under its Article I powers.[56]

Following *Seminole Tribe*, the Court decided *Alden v. Maine*,[57] in which it applied the same rules to suits against states under federal laws in the states' own courts.[58] The end result was that states could not be sued for money damages in any court unless the states consented or unless Congress validly abrogated the states' immunity under the Fourteenth Amendment.[59]

For the many statutes that provided a private right of action for damages against states, it was natural then that after *Seminole Tribe* and *Alden*, the focus shifted from whether Congress intended to abrogate states' sovereign immunity to whether it had validly done so under the Fourteenth Amendment. This change might have been relatively minor if in the meantime the Court had not also decided *City of Boerne v. Flores*,[60] narrowing the scope of permissible Fourteenth Amendment legislation.

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50. *Id.* at 56-57 (White, J., concurring).

51. 517 U.S. 44, 66 (1996).

52. *Id.* at 67-71. This result was not an inevitable consequence of historical study. The decision was 5 to 4, and the dissent used a historical analysis to demonstrate that immunity was not part of the constitutional design. *Id.* at 78-93, 95-99 (Stevens, J., dissenting); *id.* at 107-23 (Souter, J., dissenting).

53. *Id.* at 64-65.

54. *Id.* at 54.

55. *Id.* at 59.

56. *Id.* at 63-66.

57. 527 U.S. 706 (1999).

58. *Id.* at 712.

59. *Id.* at 755 (Individuals could still sue state officials in their personal capacity and could still sue for prospective injunctive relief. Additionally, the United States can sue a state for damages.).

60. 521 U.S. 507 (1997).

## II. CONGRESS' POWER UNDER THE FOURTEENTH AMENDMENT TO PROTECT INDIVIDUALS FROM STATE ACTION

At the same time that the Court was reviving the Eleventh Amendment, the Court was considering a variety of issues involving Congress' power to protect individuals from state action. Congress has the power to regulate state behavior through either the Fourteenth Amendment or Article I.[61] In other words, the states are bound to obey laws enacted under the Fourteenth Amendment or under Article I. However, after *Seminole Tribe*, Congress has the power to create a private right of action for damages only under the Fourteenth Amendment; thus while the states must comply with laws enacted under either power, the most efficient enforcement mechanism, a private right of action for damages, can be provided against a state only by legislation enacted validly under the Fourteenth Amendment.

Congress has greater powers under Article I to reach a broader scope of conduct. Under Article I, the Court determines whether the end to be achieved by the legislation is within the legitimate powers of Congress and whether the means chosen are reasonably related to that end.[62] The Court generally has deferred to Congress as to the necessity of particular legislation—the need for the legitimate end to be served in this way.[63] Moreover, the Court has deferred to Congress on whether the end needs to be addressed by the federal government in the first instance.[64] The Court traditionally used this same analysis for enactments under Section 5 of the Fourteenth Amendment.[65]

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61. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56 (1985). Conversely, Congress can regulate private behavior only through Article I, since the Fourteenth Amendment only prohibits state action. Because both states and private entities are employers, Congress bases most employment-related civil rights legislation upon both Article I and the Fourteenth Amendment.

62. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421-23 (1819).

63.

> [W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the decree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

*Id.* at 423.

64. Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1139-40 (2001) (discussing *McCulloch*, 17 U.S. (4 Wheat.) at 402, 407, 422).

65. *City of Boerne*, 521 U.S. at 507. *E.g.*, City of Rome v. United States, 446 U.S. 156, 177 (1980); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); *Ex parte* Virginia, 100 U.S. 339, 345-46 (1879). In fact, as the Court in *South Carolina v. Katzenbach* notes, this is the test to be applied "in all cases concerning the express powers of Congress with relation to the reserved powers of the States": "'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" 383 U.S. 301, 326-27 (1966) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

The Court changed the Fourteenth Amendment analysis in *City of Boerne v. Flores*.[66] In *City of Boerne*, the Court considered whether the Religious Freedom Restoration Act (RFRA) was validly enacted under the Fourteenth Amendment. RFRA was a reaction to the Court's decision in *Employment Division v. Smith*.[67] In *Smith*, the Court held that state statutes of general applicability that were neutral on religion but that incidentally affected religious practices would be subject only to rational basis scrutiny.[68] This holding changed the law.[69] Public reaction to this change in the law was strong, and RFRA was passed in direct response. RFRA provided that any substantial burden on religion by a neutral law would be suspect, and legislators would have to show that the statute was the least restrictive means to advance a compelling governmental interest.[70] Not only was RFRA an attempt to restore the prior law on the Free Exercise clause of the First Amendment, it was also a slap in the face to the Court. RFRA stated that the prior rule made more sense, disagreeing with the Court's interpretation of the Constitution in *Smith*.[71]

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66. 521 U.S. at 507.

67. 494 U.S. 872 (1990).

68. *Id.* at 878-79.

69. While the Court denied that it was changing the law, *Smith*, 494 U.S. at 878-79, Congress clearly believed that the Court had done so. 42 U.S.C. § 2000bb(a)(4), (5).

Prior to *Smith*, the Court had considered a line of cases in which people had been denied unemployment compensation benefits after they were fired for refusing to do things prohibited by their religious practices. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). In this line of cases, the Court had held that the states could not deny unemployment compensation on this basis unless its reasons for doing so passed strict scrutiny–that withholding benefits was the most narrowly tailored means to promote a compelling governmental interest. In *Smith*, the Court denied that it was changing the law, but stated that it was simply not extending the rule in *Sherbert* to the application of criminal statutes. *Smith*, 494 U.S. at 878-79.

70. *City of Boerne*, 521 U.S. at 515 (citing 42 U.S.C. § 2000bb(a), (b)).

71. In RFRA, Congress stated:

> (1) [T]he framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a). RFRA's purposes were:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S.

Predictably, RFRA did not receive a warm welcome when challenged. In *City of Boerne*, the Court held that Congress' powers were limited to enforcing the Fourteenth Amendment, and it was the Court's role to determine the substance of that amendment.[72] The Court acknowledged that the line between measures that prevent unconstitutional conduct and measures that define the right at stake is not easy to draw and that Congress should be given wide discretion to draw that line, although the line must be drawn correctly.[73] Accordingly, the Court held that to the extent a federal law prohibited conduct that was constitutional, the law could only do so in order to remedy some existing constitutional violation, and there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[74]

In evaluating whether RFRA was congruent and proportional to the injury it was designed to prevent or remedy, the Court focused on the legislative history of RFRA and discovered that Congress had made no findings that governmental bodies were using neutral laws to discriminate against religions.[75] Because there was no constitutional evil to remedy, the legislation was out of proportion to any existing harm, and was not a proper way to "enforce" the Fourteenth Amendment.[76] The Court did not consider whether Congress could have been trying to prevent a potential constitutional violation and did not explain what kind of analysis might apply to purely prophylactic legislation, probably because the focus of RFRA was explicit: nullifying the Court's holding in *Smith* rather than remedying infringements on the exercise of religion. But by not considering a preventative goal, the Court implied that purely prophylactic legislation would never be valid under the Fourteenth Amendment unless that legislation mirrored that amendment precisely.

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398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

*Id.* § 2000bb(b). Thus, Congress directly challenged the Court's interpretation of the Constitution.

72. *Id.* at 519-24 (tracing the historical development of the language of the amendment). The Court's historical analysis has been called into question by scholars. *E.g.*, Ruth Colker, *The Supreme Court's Historical Errors in* City of Boerne v. Flores, 43 B.C. L. REV. 783 (2002).

73. *City of Boerne*, 521 U.S. at 519-20.

74. *Id.* at 520. Although the Court did not further define congruence or proportionality, subsequent lower court opinions have shed some light on the subject. "Congruence," generally has meant how closely the prohibitions of the legislation mirror the prohibitions of Section 1 of the Fourteenth Amendment. *See* Endres v. Ind. State Police, 334 F.3d 618, 628 (7th Cir. 2003). "Proportionality" refers to whether the remedies the legislation provides are narrowly tailored to resolve the particular evils the legislation is designed to address. *Id.*

75. *Id.* at 530-32. Presumably, the Court skipped to the proportionality test because RFRA was not congruent to the First Amendment as the Court had interpreted it.

76. *Id.* at 532.

While the result may have been warranted, this new test improperly restricted Congress' powers under the Fourteenth Amendment by essentially removing Congress' power to deter potential constitutional violations. Now, the Court had the policy-making power to decide whether the end Congress sought to serve needed to be served, not merely whether that end was a legitimate government interest in the abstract.[77] This new limitation had drastic effects on litigation involving states when combined with *Seminole Tribe*.

## III. THE CONVERGENCE OF THE TWO LINES OF JURISPRUDENCE AND THE TRANSFORMATION OF CONGRESS' POWER TO LEGISLATE

When the Court in *Seminole Tribe* held that Congress could not abrogate a state's sovereign immunity under its Article I power, it cast into doubt the validity of every law that provided for a private right of action against a state. It was only natural that any such laws would have to pass the new *City of Boerne* test, and the less laws mirrored the Fourteenth Amendment, the less likely they would pass the new test. Thus, while traditionally the Court had upheld many prophylactic Section 5 measures, it struck down six such measures in four years.[78] In analyzing these six measures, the *City of Boerne* test was applied with increasing rigor as the treatment of civil rights statutes demonstrates.

The first civil rights statute to be challenged as it applied to the states[79] was the Age Discrimination in Employment Act (ADEA), which the Court held was not valid legislation under the Fourteenth Amendment in *Kimel v. Florida Board*

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77. *See* Caminker, *supra* note 64, at 1131. In doing so, the Court turned expansive language from *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which found the Voting Rights Act constitutional, on its head to limit Congress' power. *See* Kimberly E. Dean, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After Garrett?*, 43 B.C. L. REV. 697, 707 (2002). Professor Dean notes that former Chief Justice Warren disagreed with this view of what *Morgan* meant. *Id.* at 707 n.88 (citing Earl Warren, *Fourteenth Amendment Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT 227 (Bernard Schwartz ed., 1970)).

78. *Garrett*, 531 U.S. 356; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); United States v. Morrison, 529 U.S. 598 (2000); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. at 507.

The Court has also struck down remedial legislation passed under Article I, thus restricting Congress' powers across the board. *Morrison*, 529 U.S. 598; United States v. Lopez, 514 U.S. 549 (1995).

79. The Court had already considered legislation to enforce due process guarantees when it held that the Patent and Plant Variety Protection Remedy Clarification Act and the Lanham Act were not valid enactments under the Fourteenth Amendment in *Florida Prepaid*, 527 U.S. at 627, and *College Savings Bank*, 527 U.S. at 666, respectively, but because the focus of this Article is on civil rights laws, those cases are not discussed in depth. They are consistent with the cases that are discussed and demonstrate that other areas, such as bankruptcy, will be affected by the Court's jurisprudence in this area as well.

*of Regents*.[80] The analysis used by the Court was a further refinement of its *City of Boerne* analysis. First, the Court examined congruence by comparing protection for the aged under the Fourteenth Amendment to the protection afforded by the ADEA.[81] The Court noted that under the Fourteenth Amendment, states may discriminate on the basis of age as long as that discrimination is rationally related to a legitimate governmental interest.[82] In other words, under the Fourteenth Amendment, classifications based on age are presumptively valid. The ADEA, on the other hand, treats age classifications as presumptively invalid, providing employers a defense to age classifications only when they are bona fide occupational qualifications reasonably necessary to the job.[83] Thus, the Court found the ADEA prohibits conduct that is constitutional and was not congruent to the Fourteenth Amendment.

The Court proceeded to examine whether despite this incongruence, the legislation might nonetheless be proportional to some persistent and intractable constitutional evil to be remedied.[84] To evaluate proportionality, the Court first examined the legislative record to see Congress' motivations and the end it wished to serve with the legislation.[85] The Court found that the legislative record lacked evidence of a pattern of unconstitutional age discrimination by the states.[86] Because there was no constitutional evil to be remedied, the ADEA lacked proportionality and was not properly enacted under the Fourteenth Amendment.[87]

The next civil rights statute to be addressed was Title I of the Americans with Disabilities Act (ADA), which governs equal employment opportunities for people with disabilities.[88] The Court held that Title I of the ADA was not a valid enactment under the Fourteenth Amendment in *Board of Trustees of University of Alabama v. Garrett*.[89] The analysis in *Garrett* was similar to that in *Kimel*, but was even more exacting. The Court first compared the reach of Title I of the ADA to what the Fourteenth Amendment required.[90] Based on *City of Cleburne, Texas v. Cleburne Living Center*,[91] the Court determined that rational basis was the level of scrutiny applicable to the disabled.[92] And, as it did with the ADEA, the Court found that Title I of the ADA made adverse job actions presumptively

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80. 528 U.S. 62 (2000).

81. *Id.* at 83-84.

82. *Id.*

83. *Id.* at 86-88 (citing 28 U.S.C. 623(f)(1) and Western Airlines, Inc. v. Criswell, 472 U.S. 400 (1985)).

84. *Id.* at 88.

85. *Id.* at 89.

86. *Id.*

87. *Id.* at 91.

88. 42 U.S.C. §§ 12111-12117 (2002).

89. 531 U.S. 356 (2001).

90. *Id.* at 365-68.

91. 473 U.S. 432 (1985).

92. *Garrett*, 531 U.S. at 365-68.

invalid, which meant that it was not congruent to the Fourteenth Amendment.[93]

Likewise, in its proportionality inquiry, the Court's examination of the legislative record was even more searching than it had been in *Kimel*.[94] The Court held that Congress had to find that *states* had an egregious pattern of discriminating in *employment*; examples of discrimination in employment by private employers, discrimination in employment by local government bodies, and discrimination in public access by states could not support application of the employment title against the states, nor could they support a Congressional finding that the states had discriminated in employment.[95] Not only were the main antidiscrimination provisions of Title I invalid as applied to the states, but so was the disparate impact provision, since a government action is not unconstitutional solely because it disparately impacts a protected group.[96] Because the remedy in Title I was not "congruent and proportional" to any constitutional evil, the Court found that it was not a valid enactment under the Fourteenth Amendment.[97]

As the Court seemed to be increasing the level of scrutiny of legislative records for evidence of constitutional evils, and shrinking the boundaries of congruence and proportionality, it seemed poised to invalidate nearly every private right of action against an unconsenting state.[98] But just as it seemed that any civil rights statute that did not mirror the Fourteenth Amendment or which was not supported by a detailed legislative record demonstrating a long history of egregious constitutional violations by the states would be invalid, the Court found the Family Medical Leave Act of 1993 (FMLA),[99] a valid enactment under Section 5 of the Fourteenth Amendment. The FMLA mandates that employers provide both men and women twelve weeks of unpaid leave per year for their own illnesses or to care for a family member, and allowed employees to sue for violations of its provisions.[100]

In *Nevada Department of Human Resources v. Hibbs*, the Court found that the private right of action for damages to enforce the leave provision of the

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93. *Id.* However, the Court did not consider that the ordinance in *City of Cleburne* was actually struck down on the ground that the classification in that case was based on fear and negative attitudes, the evil that Congress said it was addressing by the ADA. *Id.* at 381 (Breyer, J., dissenting). The Court also failed to closely analyze whether Title I of the ADA really created a presumption that employer actions were invalid. Arguably, by requiring only "reasonable" accommodations to "qualified" individuals, those who could perform the job with such accommodations, the ADA created a presumption that employer actions were valid rather than invalid.

94. *Id.* at 369-72.

95. *Id.* at 371-72.

96. *Id.* at 372-73.

97. *Id.* at 374.

98. As discussed *supra* note 79, the Court's decisions were not limited to the civil rights context.

99. 29 U.S.C. §§ 2601-2619 (2002).

100. *Id.* § 2612.

FMLA was "congruent and proportional" to eliminating gender-based discrimination in the workplace.[101] While the Court still seemed to require that the act be remedial (rather than deterrent) in order to be valid,[102] the Court was willing to consider sources of evidence other than the legislative record and to allow Congress to draw less obvious conclusions to show the existence of a constitutional evil to be addressed. The Court attributed its willingness to the fact that classifications on the basis of gender are subject to heightened scrutiny.[103]

To determine whether the states had a pattern of unconstitutional sex discrimination, the Court did not begin its analysis with the legislative record as it had in *Kimel* and *Garrett*. Rather, the Court began its analysis by looking to its own prior decisions, which had upheld state laws that limited women's employment opportunities.[104] When it did examine the legislative record, the Court did not limit itself to sources that detailed unconstitutional leave policies by the states. Rather, it considered reports that suggested gender-role stereotypes lead to discriminatory leave practices, it reviewed evidence from the private sector, the federal government, and local governments in addition to evidence about state governments, and it also considered evidence that had been before Congress in prior attempts to pass family leave legislation.[105] The Court also

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101. 123 S. Ct. 1972, 1982 (2003) (quoting *Garrett*, 531 U.S. at 374). The Court only considered whether the private right of action to enforce the provisions allowing leave for employees to care for another validly abrogated state sovereign immunity. The FMLA also allows employees to take leave for their own serious illnesses. Nine circuits have found that the states are immune from suit to enforce that provision because it is not related in the same way to the elimination of gender discrimination. Brockman v. Wyo. Dep't of Family Servs., 342 F. 3d 1159 (10th Cir. 2003); Laro v. New Hampshire, 259 F.3d 1, 16-17 (1st Cir. 2001); Lizzi v. Alexander, 255 F.3d 128, 134-35 (4th Cir. 2001); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 228-29 (3d Cir. 2000); Townsel v. Missouri, 233 F.3d 1094 (8th Cir. 2000); Kazmier v. Widman, 225 F.3d 519, 527 (5th Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559, 563-64 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000); Garrett v. Univ. of Ala., 193 F.3d 1214, 1219 (11th Cir. 1999).

102. *See Hibbs*, 123 S. Ct. at 1982-84.

103. *Id.* at 1981-82. Using similar reasoning, five of the thirteen federal circuits had found that Congress had validly abrogated state sovereign immunity in the Equal Pay Act under Section 5 of the Fourteenth Amendment. Varner v. Ill. State Univ., 226 F.3d 927 (7th Cir. 2000); Kovacevich v. Kent St. Univ., 224 F.3d 806 (6th Cir. 2000); Hundertmark v. Fla. Dep't of Transp., 205 F.3d 1272 (11th Cir. 2000); O'Sullivan v. Minnesota, 191 F.3d 965 (8th Cir. 1999); Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998). Two other circuits had found the Equal Pay Act to be valid Fourteenth Amendment legislation prior to the development of the *City of Boerne* test. Usery v. Charleston County Sch. Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976).

104. *Hibbs*, 123 S. Ct. at 1978.

105. The Court cites the following sources to support Congress' decision to enact the FMLA: a 1990 Bureau of Labor Statistics survey of private-sector employees, S. Rep. No. 103-3, at 14-15 (1993); a fifty-state survey discussed in The Parental and Medical Leave Act of 1986: Joint

considered the leave policies that states had implemented, most of which applied differently to women and men either explicitly or in their applications.[106] This information the Court presumed to be before Congress was "weighty enough" to justify prophylactic Section 5 legislation.[107]

The conclusions the Court allowed Congress to draw in the context of the FMLA were broad. First, the Court found that even after Title VII of the Civil Rights Act of 1964 was passed, women continued to suffer unconstitutional discrimination.[108] In particular, the administration of leave policies was often discriminatory either because the leave policies on their faces or in their applications treated men and women differently.[109] The Court seems to have recognized that Title VII did not eradicate discrimination, but only made its practices more subtle.[110] More importantly, the Court looked to the *effect* of leave policies to find that they were a mechanism that reinforced gender stereotypes. Such gender stereotypes were a product of societal discrimination, which restricted access to equal employment opportunities for women. This lack of access, in turn, reinforced societal discrimination.[111]

It is evident that the Court treated the Family Medical Leave Act significantly differently than it had the Age Discrimination in Employment Act or the Americans with Disabilities Act. The Court attributed its different treatment to the level of scrutiny due the underlying classes protected by the different acts.[112] Classifications based on age or disability are subject only to rational basis review, while gender classifications receive heightened scrutiny.[113]

However, the level of scrutiny applied to each fails to account for the focus of the Court's analysis. By focusing on the effects of employment practices rather than on the intent of employers, and by allowing Congress to regulate an employment action as a means to prevent and remedy societal discrimination, the

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Hearing Before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong. 2d Sess., 33 (1986) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project); *id.* at 147 (Washington Council of Lawyers); M. LORD & M. KING, THE STATE REFERENCE GUIDE TO WORK-FAMILY PROGRAMS FOR STATE EMPLOYEES 30 (1991); The Parental and Medical Leave Act of 1987: Hearings Before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 1, p. 385 (1987); *id.* at pt. 2, p. 170 (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago); Family and Medical Leave Act of 1987: Joint Hearing Before the House Committee on Post Office and Civil Service, 100th Cong., 1st Sess., 2-5 (1987) (Rep. Gary Ackerman); H.R. Rep. No. 103-8, pt. 2, pp. 10-11 (1993). *Hibbs*, 123 S. Ct. at 1979-80.

106. *Hibbs*, 123 S. Ct. at 1980-81.

107. *Id.* at 1981.

108. *Id.* at 1978-79.

109. *Id.* at 1980.

110. *Id.* at 1982.

111. *Id.* at 1982-83.

112. *Id.* at 1981-82.

113. *Id.*

Court's analysis seems more like an analysis under Article I of the Constitution than an analysis under the Fourteenth Amendment.[114] The proper inquiry under Article I focuses on the effect on society[115] of the action Congress seeks to regulate. Conversely, the proper inquiry under the Fourteenth Amendment has been first and foremost the intent of the actor or the effect of an action on the individual.[116]

In the Court's jurisprudence at least through *Garrett*, it engaged in complex maneuvering. Throughout the cases discussed, the Court has weighed the power of the states against the power of the federal government—determining what the federal government can force the states to do. The Court also, however, balanced its own power against the power of Congress—which body has the power to decide whether any mechanism is available to reach a particular goal, and if so, what mechanism.

The Court's failure to give Congress, a coequal branch of government, any role in interpreting the Constitution is fundamentally disrespectful.[117] Moreover, the Court's insistence in *City of Boerne* that Congress had no role to play in defining the scope of constitutional protection was a sharp break with its prior cases. For example, in *Richmond v. J.A. Croson Co.*, the Court stated that "Congress . . . has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations."[118] While

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114. In fact, the Court's reasoning might appear to conflict with its reasoning in *United States v. Morrison*, 529 U.S. 598 (2000). The Violence Against Women Act (VAWA) at issue in *Morrison* was similar to the FMLA in that it created a mechanism to redress longstanding societal discrimination against women which was facilitated by state and local officials' discriminatory refusal to treat crimes against women seriously. The discrimination and the state complicity was equally notorious as the discrimination against women in the workplace that the Court in *Hibbs* took notice of on its own. However, in *Morrison*, the Court ignored the history; and further it held that the statute was not valid under the Fourteenth Amendment even though, like the FMLA, it focused on the role that the state played in creating and perpetuating societal discrimination. The difference between the two is that the VAWA created a right of action against the criminals rather than the officials, whereas the FMLA created a cause of action against the state as employer itself. Thus, in that sense, the FMLA was directed more clearly at state action than was the VAWA.

115. I use this term somewhat loosely to refer to interstate commerce, which is fairly synonymous with our society's economy.

116. For example, only intentional discrimination in the form of explicit classification or disparate application violate the Fourteenth Amendment; disparate impact alone does not. Washington v. Davis, 426 U.S. 229, 242 (1976).

117. *E.g.*, Colker & Brudney, *supra* note 2.

118. 488 U.S. 469, 490 (1989) (plurality opinion) (citing and quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment")). *J.A. Croson* is also significant because it demonstrates that the Court is not really interested in protecting the states. In that case,

the Court was distinguishing Congress' legislative power from the legislative power of the States, rather than from the Court's judicial power, the fact remains that the Court has, at least at times, recognized that Congress has a role in determining how best to serve the principles of equality and, presumably, liberty. When the Court held in *City of Boerne* that Congress' role in serving equality was to merely effectuate what the Court deemed the national policy on equality to be, it exceeded its institutional competence. Declaring national policy is primarily a legislative function.[119] Essentially, the Court has secured to itself a way to pass on the wisdom of legislation, rather than limiting its inquiry to whether Congress has the power to enact such legislation.

Congress' power to protect individuals from state action is thus limited by whether the Court thinks that those individuals deserve protection. It is counter-intuitive that where Congress has the greatest power to make classifications of individuals under its own equal protection and due process limitations, it has the least power to require states to comply with its classifications. Conversely, where Congress has the least power to make classifications, it has the greatest power to regulate the states. Under this reasoning, the Eleventh Amendment must be stronger the greater power Congress has to regulate individuals, and weaker the less power Congress has to regulate individuals. One would expect the Eleventh Amendment either to remain constant or to give way when Congress' power was stronger.

One of the effects of the Court's maneuvering is that statutes that once enforced the Fourteenth Amendment might be found not to do so any longer when the Court decides that the people protected by that statute no longer need protection. In other words, it appears that the Court can change the national policy and decide that legislation that once enforced the Fourteenth Amendment ceases to do so once the legislation is successful enough that there is no widespread evidence that states continue systematically to violate the Constitution. And, once the Court finds that legislation has ceased to be remedial, it would be bound by its jurisprudence to find that legislation no longer valid under the Fourteenth Amendment, and thus no longer a valid abrogation of state sovereign immunity. The Court could also decide that since the validity of this type of legislation might expire, it might require all prophylactic legislation

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the Court held that the states had less ability than Congress to legislate in the area of race because the Fourteenth Amendment expressly gave Congress primary authority in the area. *Id.* at 489-90.

The decision in *J.A. Croson* also highlights an inconsistency in the Court's equal protection analysis. In that case, the Court held that even "benign" classifications, those that benefitted the discrete and insular minority, should be subject to strict scrutiny because it was nearly impossible to determine whether the effects of the classification at issue would truly be benign or if they would merely create new mechanisms for oppression. *Id.* at 493. By requiring that legislation be proportional to the particular harm that Congress has documented, the Court leaves open the possibility that neutral laws which protect the majority in the same way that they protect the minority might not comply because they are too broad and not proportional to the harm.

119. *See, e.g.*, Local 1976, United Broth. of Carpenters and Joiners of Am. v. NLRB, 357 U.S. 93, 100 (1958); Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 42 (1933).

under the Fourteenth Amendment to be limited in time.

It is not just the underlying logic of the Court's decisions that leads eventually to this result; the Court explicitly suggests the same thing. In its proportionality analyses, the Court has indicated several times that time limits factored into its decision. In *South Carolina v. Katzenbach*, the Court found the Voting Rights Act valid in part because the most sweeping parts of the act were limited in time and in geographical scope.[120] In *City of Boerne*, as well, the Court remarked that RFRA was not proportional to the First Amendment in part because it had no termination date or termination mechanism.[121]

Of course, the Court stated in each case that the limits were not necessary to its decision. For example, in *City of Boerne*, the Court stated that a termination date or mechanism merely tended to ensure that means are proportionate to ends.[122] And, in *Katzenbach*, after the Court repeatedly stressed that the Voting Rights Act provisions were limited in time, limited in geography, and limited to the most egregious practices, the Court hastened to add, "[t]his is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates."[123] I am inclined, however, to agree with Professor Brant, who wrote that "when Justice Kennedy says that the voting rights cases survive constitutional scrutiny because the V.R.A. was aimed at a discrete class of state laws, was less than national in scope, and was of limited duration, then the lower courts will faithfully apply those factors in their analysis."[124] To echo her, when Justice Kennedy says that limited duration matters, the courts will consider duration in their analyses.

The best indication of this power of language is the Court's subsequent out-of-context use of the language in *Katzenbach* in *City of Boerne* to limit the power of Congress to enact Fourteenth Amendment legislation. In *Katzenbach*, in the context of discussing the broad powers Congress had under the reconstruction amendments, the Court said "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[125] The remedial powers the Court was referring to were those that allowed Congress to prohibit conduct that was constitutional in order to ensure that states were not discriminating in establishing voting qualifications. The Court in *City of Boerne* took that language and stated that "[t]he Court has

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120. 383 U.S. 301, 328-29 (1966). The geographical limitation also raises an interesting point that Scalia takes up in his dissent in *Hibbs*. He suggested that a particular state's sovereign immunity could be validly abrogated under the Fourteenth Amendment only if Congress had found that state had a history of systematic constitutional violations. *Hibbs*, 123 S. Ct. at 1985 (Scalia, J., dissenting). Scalia's view seems aligned with the theory that sovereign immunity is a doctrine of personal rather than subject matter jurisdiction. For more on that theory, see Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002).

121. 521 U.S. at 533.

122. *Id.*

123. 383 U.S. at 328-29.

124. Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 792 (1998).

125. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

described [Congress'] power as 'remedial,'" as if Congress' power were solely remedial.[126] If the Court can take such language out of context to change the rules, in other words if the words rather than their intent count, lower courts will feel equally bound to give effect to the Court's rules regardless of what it meant by them.[127]

While the line of cases through *Garrett* leads to this result, *Hibbs* fails to resolve the matter and confuses the issue further. After *Hibbs*, the principles of Equal Protection and Due Process have become a ceiling on Congress' power, rather than the floor, for the protection of individuals. While the Fifth Amendment allows Congress to enact laws to protect non-suspect classes as long as those laws are rational, the Eleventh and Fourteenth Amendments limit the application of those laws to the states unless the laws mirror the protections the Fourteenth Amendment gives to individuals.[128] Granted, this scheme might

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126. 521 U.S. at 519.

127. An example of how the lower courts are prone to taking the Court's words out of context is the split that arose in the federal courts after the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The Court took *St. Mary's Honor Center* to resolve a split in the circuits about how lower courts should evaluate employment discrimination cases when the employer lies about the real reason for its actions. *Id.* at 512-13. Some courts had held that once the trial court found that the employer lied, it was required to find in favor of the plaintiff (the pretext-only rule). *E.g.*, Drake v. City of Fort Collins, 927 F.2d 1156, 1160 (10th Cir. 1991); MacDissi v. Valmont Indus., Inc. 856 F.2d 1054, 1059 (8th Cir. 1988); Dister v. Cont'l Group, Inc., 859 F.2d 1108, 1113 (2d Cir. 1988); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1563-64 (11th Cir. 1987); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987) (en banc); Tye v. Bd. of Educ. of Polaris Joint Vocational Sch. Dist., 811 F.2d 315, 318 (6th Cir. 1987); Bishopp v. District of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986); Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985), *modified*, 784 F.2d 1407 (1986). Other courts found that the trial court was prohibited from entering judgment in favor of the plaintiff without further specific proof of discriminatory animus (the pretext-plus rule). *E.g.*, Bienkowski v. Am. Airlines, Inc. 851 F.2d 1503, 1508 (5th Cir. 1988); Goldberg v. B. Green & Co., 836 F.2d 845, 849 (4th Cir. 1988); White v. Vathally, 732 F.2d 1037, 1042-43 (1st Cir. 1984). In *St. Mary's Honor Center*, the Court struck a middle ground, finding that the trier of fact was not compelled to enter judgment in favor of the plaintiff, but could without more evidence if it drew the inference that the real reason for the employer's actions were discrimination. 509 U.S. at 511.

However, after *St. Mary's Honor Center*, a new split developed between the circuits, in which some of them interpreted the Court to require the pretext-plus rule, while others followed what the Court actually held. Marcia L. McCormick, *Truth or Consequences: Why the Rejection of the Pretext Plus Approach to Employment Discrimination Cases in* Reeves v. Sanderson Plumbing *Is the Better Legal Rule*, 21 N. ILL. L. REV. 355, 363 (2001). The Court had to take *Reeves v. Sanderson Plumbing Products* to resolve the persistent split, and in an uncharacteristically unanimous opinion, wrote that it meant what it had said, once again rejecting the pretext-plus approach. 530 U.S. 133, 148 (2000).

128. Of course, the states would still have to comply with the law as long as it was validly enacted under Article I, but the most effective remedy, a private suit for damages, would not be available.

appear to contain a kind of logic, since the states also have more power to regulate individuals when not dealing with suspect classes, but it completely ignores the principle implicit in the Fourteenth Amendment that individuals have the constitutional protection of national citizenship.

That *Hibbs* failed to resolve the problem is best supported by a recent decision from the Seventh Circuit on Title VII's religious accommodation provision. In *Endres v. Indiana State Police*, the Seventh Circuit found that the religious accommodation provision of Title VII did not validly abrogate state sovereign immunity.[129] In its analysis, the Seventh Circuit ignored two key points: (1) the abrogation in Title VII was found to be valid in *Fitzpatrick*, and the Court did not indicate that its analysis was limited to the gender discrimination provisions of Title VII; and (2) the religious accommodation provision in particular was valid under the Constitution at the time Congress passed Title VII and provided that it applied to the states.

Title VII prohibits employers from taking an adverse employment action against an employee because of that employee's religious observance, practice or belief, "unless an employer demonstrates that [it] is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."[130] The Court has interpreted this provision very narrowly to require an accommodation only if it causes a minimal hardship or no hardship at all to the employer or other employees.[131]

At the time that Title VII was enacted and applied to the states, neutral practices that substantially burdened an individual's religious practices or beliefs had to be narrowly tailored to support a compelling state interest.[132] Thus, when enacted, the religious accommodation provision was easily both congruent and proportional to the Fourteenth Amendment. However, when the Court decided *Smith*, the case that prompted RFRA, the landscape changed. After *Smith*, neutral practices that impact religion need only be rationally related to a legitimate government interest.[133] Accordingly, after *Smith*, the Seventh Circuit reasoned, the religious accommodation provision is no longer congruent to the Fourteenth Amendment because *Smith* requires an attitude of neutrality toward religion, and accommodation is not neutrality.[134] The Seventh Circuit also held that the religious accommodation provision was not proportional to any

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129. 334 F.3d 618, 628-30 (7th Cir. 2003). The Seventh Circuit reheard this appeal en banc, but at the time this Article went to press, it had not issued a new decision.

130. 42 U.S.C. § 2000e(j) (2002).

131. Trans. World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

132. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); Sherbert v. Verner, 374 U.S. 398, 402-03 (1963).

133. 494 U.S. at 882-84.

134. *Endres*, 334 F.3d at 628. Although the Seventh Circuit recognized that undue hardship meant only minimal hardship for the states, it found implicitly that the religious accommodation provision made state actions that impacted religion presumptively invalid by relying on the Court's meager analysis on the subject in *Garrett*. *See id.*

constitutional evil, since the legislative record of Title VII was entirely silent on the subject of whether states discriminated on the basis of religion.[135]

In this way, a statutory provision which once was a valid abrogation of state sovereign immunity became invalid.[136] Additionally, while the passage of time was not the only factor that invalidated this portion of Title VII, it certainly affected the perspective with which the court viewed the states' treatment of religious differences.

It is not too far of a stretch to think that one day, the Court may decide that racism or sexism has been resolved to the extent that classifications on those bases no longer deserve heightened scrutiny. As Justice O'Connor said in *Grutter v. Bollinger*, "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[137] Affirmative action rests on the principle that members of certain protected classes should be preferred for some things, all qualifications being equal, to increase their participation in all aspects of life and to help make up for a history of exclusion. If affirmative action can be dispensed with, the justification for heightened scrutiny will be next. Heightened scrutiny is justified on the theory that some classes are "discrete and insular minorities" which need special judicial protection from oppression based on their status.[138] On the day that heightened scrutiny seems less vital, Title VII, one of the most valuable pieces of legislation in the antidiscrimination arsenal, will no longer validly abrogate state sovereign immunity, as a matter of judicial fiat.

The Court's Fourteenth and Eleventh Amendment jurisprudence revises the Constitution to create a confederacy. It posits an adversarial model of federalism, in which the states and the federal government vie for power, but in which the states have little practical power against the force of the federal government.[139] This jurisprudence focuses on states as if the states had rights

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135. The Seventh Circuit did acknowledge that it was not limited to the legislative record to support a history of discrimination, but found that there was no such history. *Id.* at 629-30.

136. Supporters of the Court's federalism jurisprudence could argue that the religious accommodation provision was never a valid enactment because the constitutional analysis before *Smith* was incorrect, and *Smith* merely stated what the law had been (or should have been) all along. That does not change the fact that for nearly thirty years, the religious accommodation provision of Title VII was actually a valid enactment under the Fourteenth Amendment and thus a valid abrogation of state sovereign immunity.

137. 123 S. Ct. 2325, 2348 (2003). The hope that this statement evinces is laudable. It would be wonderful to eradicate discrimination and to affirmatively re-right the balance so that everyone's basic needs were satisfied and they had equal access to opportunities regardless of race or skin color. The danger that the statement belies, however, is that the Court seems to believe that the government's job to reach this goal ends when formal equality is achieved on the surface, regardless of whether discrimination is still active.

138. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 n.10 (1986); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

139. This adversarial model has been criticized as inaccurately capturing the dynamic often

that needed special protection under the Constitution.[140]

However, the Fourteenth Amendment was not enacted and ratified to protect the states from encroachment by the federal government, nor to protect the federal government from encroachment upon its powers by the states.[141] Rather, the Fourteenth Amendment was enacted and ratified because *individuals* needed protection from the states.[142] If there must be an adversarial model applied to our structure of government, the Fourteenth Amendment posits the people on one side, with the states on the other, and the federal government acting as the intermediary necessary to keep the states from encroaching on the people.[143] The Fourteenth Amendment was enacted because the promises of the Federal Constitution, equal treatment for all and protection of life, liberty, and property, were being frustrated by state governments.[144] After all, "[i]n the compound

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present in which states actively lobby for federal legislative assistance to protect individual rights. Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002) (proposing a cooperative rights model of federalism).

140. "At the core of the Rehnquist Court's Section 5 cases is the anti-federalist conviction that close judicial oversight is necessary to protect local interests from federal domination since the U.S. Constitution, [sic] is structurally ineffectual in affording the states meaningful representation." Banks, *supra* note 6, at 451.

141. There may be some support for the proposition that the Second Amendment protects the rights of states or local governments to have national guard and police forces, rather than the individual's right to possess weapons. *See generally* Carl T. Bogus, *The History and Scholarship of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3 (2000); Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53 (2002); John Randolph Prince, *The Naked Emperor: The Second Amendment and the Failure of Originalism*, 40 BRANDEIS L.J. 659 (2002). And, it is true that the Tenth Amendment acknowledges that states have some powers. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). However, the majority of other amendments clearly protect individuals from an overreaching government, and even the Tenth Amendment notes that the people are ultimately sovereign. Of course, the Ninth Amendment states that unequivocally. U.S. CONST. amend IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Regardless of whether the Ninth Amendment constitutes a source of individual rights, at the very least, its expressive value suggests that ultimately the Constitution exists to protect individuals from an overreaching government. *See* Amar, *supra* note 4.

142. *See* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 66-74 (1993); Abel A. Bartley, *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 AKRON L. REV. 473 (2003).

143. Other parts of the Constitution, notably Article I and the first ten amendments, may envision the federal government as the adversary of the people, but the Fourteenth Amendment is, by its terms, a positive grant of power to the federal government to limit the powers of state governments. U.S. CONST. amend. XIV.

144. John Bingham, the author of the Fourteenth Amendment, explained his view of the meaning of equality as embodied in that amendment:

republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each, is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people."[145] By losing sight of whom the Fourteenth Amendment is designed to protect, the Court is frustrating the core constitutional values of national citizenship, liberty, and equality.[146]

## IV. FOCUSING ON DETERRENCE RESTORES THE COURT AND CONGRESS TO THEIR PROPER ROLES AND PROPERLY SERVES TO PROTECT INDIVIDUALS

The Constitution is designed to limit the powers of the government in order to promote the rights of individuals. Therefore, it must set a minimum standard for equality and liberty, upon which no government can encroach. It makes no sense in most cases to think that the Constitution describes the mechanism by which equality and liberty can be maximized on a national scale.[147] The values of national citizenship, liberty, and equality are best served by recognizing that the Constitution establishes the minimum protection necessary for individuals and then by allowing Congress to legislate in a wide variety of areas and to provide private rights of action for money damages against states through that legislation. Congress should be allowed to experiment with ways to promote equality, liberty, and the benefits of national citizenship to the full extent of its enumerated powers as constrained by the amendments other than the Fourteenth, which is not a constraint on the federal power. As a part of its power, Congress must be able to enact the most effective remedy to accomplish its goals.

Legislation rather than judicial action promotes these goals best for a number of reasons. First, legislation is more flexible. One of the reasons the Court hesitates to acknowledge that some classes should get protection or that some

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> The equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil . . . the charm of that Constitution lies in the great democratic ideals which it embodies, that all men, before the law, are equal in respect of those rights of person which God gives and no man or state may rightfully take away.

Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 719 (2003) (quoting Cong. Globe, 35th Cong., 2d Sess. 985 (1859)).

145. THE FEDERALIST No. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

146. Banks, *supra* note 6, at 465 (citing WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLES TO JUDICIAL DOCTRINE 80 (1988)). During and immediately after Reconstruction, the Court read this protection so narrowly that it nearly eviscerated the purpose of the amendments. *Id.* at 438-39.

147. This line of thought does get a bit complicated by the rights-based model we use for thinking about liberty and equality. In a rights based model, individual rights often conflict with one another. Race offers a good example of these kinds of conflicts. One of the reasons that racial classifications get strict scrutiny is that benefitting one race can be seen as harming all others. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

rights warrant protection is that once it does so, it cannot easily go back on its decision.[148] Congress, on the other hand, is free to repeal legislation so long as the rights it grants are not required by the Constitution. Second, the very reasons why Congress is the appropriate body to make policy and the Court is not, support that Congress should be given its full authority. The process of legislative factfinding and investigation allows a wider variety of information and views to be considered. Courts, on the other hand, are limited to the facts presented by particular cases before them and are allowed access to only certain types of information. Moreover, the wide access Congress has to more types of information make it easier for Congress to discern a pattern of troubling activity and work through the possible causes or potential ramifications of that activity. Courts can only hear cases, which must be presented in an adversarial setting, which must be brought under an already recognized cause of action, and which are brought only when the parties have resources sufficient to warrant the time, money, and energy it costs to litigate and appeal. Thus, courts simply cannot see trends the way Congress can.[149] Finally, Congress can engineer more social change because the remedies it can provide are general in nature not limited to a particular party from a particular case.

Not only is legislation the appropriate vehicle for experimenting with ways to maximize equality and liberty, but the federal legislature is in the best position to do so. First, as argued above, the Constitution values national citizenship, which suggests that maximum equality should be shared by all national citizens, which individual states cannot guarantee. Additionally, the Fourteenth Amendment tells us that the states cannot be trusted to maximize equality and liberty even for their own citizens. Moreover, because Congress is focused on the entire country, it has a much clearer view than the states can have of patterns of troubling activity. Finally, the interest of the states are adequately protected by the composition of Congress. While there might be some concern that since senators are popularly elected, rather than elected by the state legislature, they do not represent the states as states, the fact that each state has equal power within the Senate decreases the possibility that a tyrannical minority could

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148. In fact, when it comes to establishing fundamental rights, or the controversial concept of substantive due process, the Court may never be able to take away rights it has acknowledged. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (describing the hesitation the Court has to recognize previously unrecognized fundamental rights). Protected classes, on the other hand, may be more flexible, although it is difficult to say when a traditionally disempowered group might become empowered enough to no longer be a "discrete and insular" minority that requires protection from the majority. *See* Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

149. What is even more important for this context is that under the Court's current jurisprudence, Congress cannot enact remedial legislation unless the constitutional violations by the states are systematic and widespread. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 371-72 (2001). Because it is monumentally more difficult to detect a pattern of violations through adjudications, the Court will rarely if ever have institutional knowledge of a widespread pattern of constitutional patterns that under its test would warrant a more sweeping remedy than the Fourteenth Amendment already provides.

completely eviscerate the power of the states.[150]

This is not an argument that the states have no role in enhancing liberty or equality of the people, and it is not an argument that Congress' power to legislate should be unbridled. The argument is, instead, that analysis of civil rights legislation should focus on whether the legislation maximizes individual equality and liberty. Both the state legislatures and the federal legislature should be given the power to experiment with ways to maximize that equality and liberty. Moreover, the Supreme Court retains a role by declaring the minimum protection the Constitution requires. The federal legislature can enact protections above that minimum, whereby its enactments become the minimum protection of individuals. Above that, the states would be allowed to protect individuals to an extent further than Congress and the Federal Constitution both.

This conception of power to enact civil rights laws comports with institutional competencies of each branch and type of government and ensures a wide variety of experimentation. Additionally, it allows the widest latitude to experiment in protecting groups like gays and lesbians, or rights, like the right to die, that may not qualify for strict scrutiny under the constitutional analysis, but nonetheless warrant protection.[151]

In order to justify empowering Congress to promote a broader kind of liberty and equality than that minimum level required by the Constitution, scholars have generally looked to little-used sections of the Constitution that could be used to promote the values of national citizenship and equality, such as the Privileges and Immunities clause and the Ninth Amendment.[152] While these are valid and interesting arguments, there is no need to look beyond the Court's own language to find a way to resolve the issue. The Court has always said that the power to enforce the Constitution includes the power to deter constitutional violations. If

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150. This argument is certainly susceptible to the fact that federal lawmakers are subject to so much "special interest" lobbying that there is no way to ensure that they can know the will of the people. It is also vulnerable to the argument that once a person moves "within the beltway" in Washington, D.C., that person loses touch with the state and enters a kind of large-scale, group-think culture. However, state lawmakers are not immune from these exact attacks either. There is at least as much state-level lobbying as that present at the federal level, and state lawmaking occurs in state capitals, often far removed geographically and culturally from the people the state lawmakers represent.

151. In fact, the more such groups and rights can be protected by legislation, the less likely it is that the Court will have to step in at some point to recognize a new suspect class or new fundamental right.

152. *See, e.g.*, Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745 (1997); Thomas B. McAfee, *Federalism and the Protection of Rights: The Modern Ninth Amendment's Spreading Confusion*, 1996 BYU L. REV. 351; William J. Rich, *Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity*, 28 HASTINGS CONST. L.Q. 235 (2001); Zietlow, *supra* note 144 (arguing that the Privileges and Immunities clause provides a source of individual rights); Rebecca E. Zietlow, *Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism*, 62 U. PITT. L. REV. 281 (2000).

the Court simply gave force to its own language and considered that deterrence is a form of enforcement even when purely prophylactic, it could restore the proper balance of powers dictated by the Constitution.[153]

Deterrence is enforcement; that is nearly a tautology. Any action that would deter unconstitutional conduct enforces the Constitution. However, deterrence happens at a different point in time than does remedy. There must first be an ill in order to apply a remedy. Setting up the inquiry in this way requires the Court to determine whether there is really an ill in the first place. Requiring the Court to evaluate whether there is an ill has allowed it to determine whether the end deserves to be addressed by Congress. The Court, for the first time, can ask whether legislation is necessary at all, not just whether the particular mechanism created by the legislation is an appropriate means to serve the end Congress has chosen, and not just whether the legislation and the end Congress has chosen is within its power.

Deterrence, on the other hand, does not allow the Court to evaluate whether the end must be served. Rather, the Court is limited to looking at the particular mechanism the legislation creates and asking whether that mechanism could deter conduct that is within Congress' power to prohibit. Focusing on deterrence restores the means and ends test to its prior formulation by broadening the proportionality review to a rationality review, and it removes the Court's ability to examine the value of the end to be served.

Consider the example of disparate impact legislation. It is well established that actions which have a disparate impact even on a protected group do not themselves violate the Constitution.[154] However, prohibiting actions that had a disparate impact would tend to deter states from intentional discrimination. When a practice has a disparate impact, there is always the chance that the reason for it is some kind of unconscious or sublimated discriminatory belief. Making states liable for disparate treatment in employment would force them to determine whether the cause was actually unconscious or well-disguised animus toward a group, which would tend to root out more unconstitutional behavior. Similarly, legislatively protecting classes that are not suspect would tend to make the states focus more carefully on whether their classifications were based on real differences among classes or stereotypes.

Because these deterrents are clearly a way of guaranteeing the substantive rights to equality or liberty guaranteed by the Fourteenth Amendment, deterrence fits within the literal terms of Section 5. Because allowing Congress to deter potential constitutional violations rather than merely remedy existing widespread violations also better maximizes equality, liberty, and the benefits of national

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153. The Court stated prior to *City of Boerne* that Congress has the positive power to enact purely prophylactic legislation. Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989). It also held in *Morgan* that if the Court could perceive that Congress had a basis for its actions, the legislation in question should be upheld. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). In *City of Boerne*, the Court did not purport to overrule these cases. Rather, it suggested that *Morgan* limited Congressional action to that which was reasonably necessary to remedy a constitutional evil.

154. Washington v. Davis, 426 U.S. 229 (1976).

citizenship, it is the power the Court should look to in evaluating whether Congress is validly abrogating state sovereign immunity.

## CONCLUSION

Despite the "sky-is-falling" tone of this Article, the reader may be left with a lingering feeling of, "so what?" The class of legislation affected by the Court's jurisprudence in this area is only a small proportion of the entire universe of litigation. For one thing, in the employment context, only about 3.4% of the workforce is employed by the states.[155] For another, individual state officers can still be sued for money damages, and under *Ex Parte Young*, state officers are subject to suits for prospective injunctive relief. Finally, the United States can always sue the states for money damages. But, the fact remains that the most effective deterrent is the private cause of action for money damages. Without that mechanism for enforcement, legislation will be mostly ineffective.

There is also a danger that Fourteenth Amendment restrictions will bleed into general antidiscrimination theory. If conduct is not bad enough to be the subject of Fourteenth Amendment legislation, maybe it is not something that needs to be regulated at all. Granted, Congress' power under Article I, which is the basis for all civil rights legislation that applies to private parties, is plenary rather than remedial. However, there is a certain expressive value to the Fourteenth Amendment. If that is gone, it will change how we and members of Congress think about equality.

In order to maximize equality and liberty and to protect the value of national citizenship, the Court should recognize that deterrence is a method of enforcing the Fourteenth Amendment. Doing so will restore Congress and the Court to their proper roles, and fulfill the promise of the Constitution for the individuals it is designed to protect.

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155. According to the Bureau of Labor Statistics of the Department of Labor, in 2000, 4,370,160 of the nations 129,877,063 workers were employed by state governments. http//:data.bls.gov.

# THE PLACE OF MORAL JUDGMENT IN CONSTITUTIONAL INTERPRETATION

RONALD C. DEN OTTER*

> Fact situations do not await us neatly labeled, creased, and folded, nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.[1]

Today, in the United States, through judicial review, courts settle a wide range of political, moral, social, cultural and economic issues.[2] As we recently learned, the United States Supreme Court can even decide a presidential election.[3] Although the exercise of judicial review is arguably antidemocratic, most constitutional law scholars have come to accept its legitimacy over time.[4] As such, at least in the near future, judges will continue to decide many matters of national importance, including people's right to abortion, physician-assisted suicide, affirmative action, capital punishment, and same sex marriage. When we turn these problems of social morality into questions of constitutional law and expect judges to resolve them, it stands to reason that we must take special care

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1. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, *in* THE PHILOSOPHY OF LAW 23 (Ronald Dworkin ed., 1977).

2. *Cf.* RONALD DWORKIN, A MATTER OF PRINCIPLE 2 (1985) [hereinafter DWORKIN, A MATTER OF PRINCIPLE].

3. Bush v. Gore, 531 U.S. 98 (2000).

4. *See* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 238 (1988) (arguing that an active role for the judiciary has "dominated modern American constitutional theory and practice"); *see also* MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 11 (1982). A number of conservative judges have sought to restrict the scope of judicial review in the name of democratic self-rule. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); William H. Rehnquist, The Notion of a Living Constitution, *in* Will E. Orgain Lecture (Mar. 12, 1976), 54 TEX. L. REV. 693 (1976); Antonin Scalia, Originalism: The Lesser Evil, *in* William Howard Taft Constitutional Law Lecture (Sept. 16, 1988), 57 CINN. L. REV. 849 (1989). There is a vast literature on whether the exercise of judicial review can be squared with the practice of democracy. Most commentators, albeit for different reasons, have concluded that judicial review can peacefully coexist with our equally important commitment to democratic self-rule. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 3-33 (1991); RONALD DWORKIN, LAW'S EMPIRE (1986) [hereinafter DWORKIN, LAW'S EMPIRE]; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

in selecting the right people for the job. Unfortunately, theories of law and adjudication do not typically describe the character of a good judge.[5]

Other commentators have doubted our ability to select judges on the basis of their moral expertise.[6] After all, especially in a democracy, the very notion of moral wisdom is bound to be somewhat controversial.[7] As Richard Posner puts it, "[I]t is not obvious that an independent judiciary is in the public interest; the people may be exchanging one set of tyrants for another."[8] Nevertheless, unless we eliminate judicial review altogether, we must try to make the best possible choices in determining what kind of people ought to sit on the bench. This Article contends that making such choices requires an understanding of the cognitive role that moral judgment plays in enabling a judge to render good decisions.[9] Indeed, a judge who cannot exercise such judgment is not a person who is qualified to decide the most important questions of constitutional law.[10]

The rule of law requires appellate judges to assess each case on the merits.[11] An opinion that reads like an ad hoc rationalization for a particular outcome is likely to call into question the integrity of the judge. A legal decision that is reached exclusively for non-legal reasons is also illegitimate inasmuch as dissenters have not been given sufficient reasons to comply with it.[12] From the standpoint of legitimacy, there is an important difference between a judge who uses precedent to rationalize the legal conclusion that she favors on personal grounds and a judge who sincerely tries to find the most plausible legal answer in a particular case. One may believe that there ought to be a constitutional right

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5. *See* Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1617, 1623 (1988).

6. *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958).

7. *Cf.* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 285 (1983) (arguing that "[a]ll arguments for exclusive rule, all anti-democratic arguments, if they are serious, are arguments from special knowledge").

8. RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 6 (1990).

9. For the idea of "moral judgment," the Author is indebted to Barbara Herman, *The Practice of Moral Judgment*, *in* THE PRACTICE OF MORAL JUDGMENT 73-93 (1993).

10. In what follows, I focus exclusively on questions of constitutional law that involve moral disagreement. Whether moral judgment is required in more technical areas of constitutional law is beyond the scope of this Article.

11. *Cf.* Robert W. Bennett, *Objectivity in Constitutional Law*, U. PA. L. REV. 445, 446-47 (1984) (arguing that "despite their [theoretical] differences, both originalists and nonorginalists insist upon external constraints on judicial choice, and both often express their insistence as a concern that judges be objective").

12. I am assuming, of course, that there is no general moral obligation to obey the law simply because it is the law and that there is a meaningful difference between moral and prudential reasons. On the relationship between the giving of reasons and the legitimate exercise of political power, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980). On the conflict between political authority and moral autonomy, see ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970).

to welfare, housing, or health care, for example, but that belief, to have legal force, would have to be based on a reasonable reading of the constitutional text, its linguistic implications, or on the cases that have construed its meaning over time.[13] Legitimate constitutional adjudication is principled when it is based on legal reasons that are independent of the result that the judge might prefer if she were acting in the capacity of citizen or legislator.[14] A judge who allows her policy preferences or moral beliefs alone to dictate the legal result has not rendered a legitimate decision because that decision could not be justified to those who do not share her personal preferences or convictions.[15] Under conditions of reasonable moral pluralism, one of the primary purposes of appealing to the law is that the law, as opposed to other sources of authority, is more likely to legitimate controversial decisions and thus, to encourage compliance.[16]

The ability to remain faithful to the law is the first virtue of judges who are entrusted with the power of judicial review and who are committed to exercising it in a manner that minimizes its antidemocratic tendencies. Honest recognition of the temptation to decide cases on non-legal grounds is the first step toward the kind of self-restraint that we should expect judges to exhibit in a constitutional democracy. A judge who is not honest with herself in this regard is not likely to behave in a principled, professional manner. At the same time, most constitutional adjudication requires moral choice on the part of the judge.[17] In

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13. For an argument in favor of such rights, see Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

14. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-19 (1959).

15. Public justification requires meeting those with whom we disagree on common ground. JOHN RAWLS, A THEORY OF JUSTICE 580 (1971). For Rawls's most recent views on public justification, see JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 26-29 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]. However, such justification need not be addressed to unreasonable persons. On this point, see Erin Kelly & Lionel McPherson, *On Tolerating the Unreasonable*, 9 J. POL. PHIL. 38 (2001).

16. "Conditions of reasonable moral pluralism" refers to intractable disagreement over the nature of the good life for human beings. JOHN RAWLS, POLITICAL LIBERALISM, at xviii (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. As John Rawls puts it, "A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines." *Id.* For an excellent overview of the range of arguments that support the conclusion that in some instances there are moral reasons to obey the law, see KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 47-203 (1987). Some studies suggest that there is a moderately strong link between compliance with the law and belief in its legitimacy. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 7 (1990).

17. In hard cases, Dworkin believes that a judge cannot apply a legal rule in a straightforward manner—as if a conclusion followed from the premises—to reach the right legal answer. Positivists, such as H.L.A. Hart, also insist that judges have choice in hard cases. Whereas Hart

fact, the vast majority of appellate cases are likely to be hard cases where legal rules or principles alone cannot resolve them.[18] The main premise of this Article is that a commitment to principled adjudication is a necessary but not a sufficient condition of judging well.[19] Appeal to principled adjudication only gets us so far in understanding the operation of good judging because such a theory merely touches upon the moral psychology of a judge who has the right attitude toward her professional responsibilities. Equally important, we must try to understand what should happen in the mind of a judge who conscientiously tries to find the best answer to a difficult legal question.[20]

The application of abstract principles to concrete circumstances is not strictly deductive in the sense that a premise implies a conclusion.[21] As H.L.A. Hart once remarked, "Logic is silent on how to classify particulars—and this is the heart of a judicial decision."[22] In hard cases, the application of a legal rule is bound to turn on the interpretation of the principles and policies that are not explicitly contained in the rule itself.[23] In particular, constitutional interpretation often requires the judge to bridge the gap between highly abstract constitutional language and the actual particulars of the case.[24] At the very least, to decide

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thinks that law runs out and as such, the judge must legislate to fill in the gaps, Dworkin maintains that the judge can still weigh policies and principles (which are part of the law, more broadly defined) in rendering a legal decision. From either standpoint, whether a judge reaches the right decision or a good decision turns on her ability to choose wisely. Despite their deeper theoretical differences over the character of law, then, both Ronald Dworkin and H.L.A. Hart agree that in rendering appropriate decisions, judges must often make moral choices. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 123-130 (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]; H.L.A. HART, THE CONCEPT OF LAW 12, 204 (2d ed.) (1961).

18. Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1731 (1988).

19. *Cf.* LAWRENCE A. BLUM, MORAL PERCEPTION AND PARTICULARITY 51 (1994) (arguing that intellectual acceptance of and psychological commitment to particular moral principles does not guarantee that the moral agent will be able to recognize particular situations that implicate those principles).

20. For an argument that there are right answers to hard cases, see DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 119-45. For his account of hard cases, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 81-130. Basically, a hard case is hard when "precedents go in both directions and no clear legal rules apply." VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY, at ix (1998). A hard case also raises highly controversial legal issues that divide reasonable people with legal training. David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105, 105-06 (1988).

21. *See* Hart, *supra* note 1, at 23; *see also* KLAUS GUNTHER, THE SENSE OF APPROPRIATENESS: APPLICATION DISCOURSES IN MORALITY AND LAW, at xiii (1993).

22. *See* Hart, *supra* note 1, at 25.

23. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2-30 (1996); Benjamin Gregg, *Using Rules in an Indeterminate World*, 27 POL. THEORY 357, 358 (1999).

24. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 136.

whether a punishment is "cruel and unusual," whether a search is "unreasonable," or whether a group of people have been treated "equally" calls for minimal moral judgment. For this reason, the job description of a judge involves more than legal competence.[25] This Article tries to explain what it means for judges to approach hard cases with moral sensitivity and why judges must be able to exercise moral judgment competently in reaching the best possible decision.[26] To exercise moral judgment is to discern the morally relevant facts of the case,[27] to apply abstract language in a morally sensitive way, to appreciate good analogies,[28] and to weigh competing considerations

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25. *See* Gavison, *supra* note 5, at 1653; Schauer, *supra* note 18, at 1717-33.

26. I do not take sides in the debate between Dworkin and others on the question of whether there is a single correct answer in hard cases or how we might know whether such an answer was correct. In fact, even Dworkin concedes that "the inevitable vagueness or open texture of legal language sometimes makes it impossible to say that a particular proposition of law is true or false." DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 128. The point is that some answers to hard questions are more likely to be legally and morally justified than other answers and it is the duty of the judge to narrow the range of plausible answers and select the answer based on the arguments that she finds to be most convincing even when others might reasonably disagree with the decision that she ultimately reaches. In doing so, a judge should always act as if there were a single correct answer to the hard case at hand.

27. *See infra* notes 142-52 and accompanying text.

28. *See generally* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996); James R. Murray, *The Role of Analogy in Legal Reasoning*, 29 UCLA L. REV. 833 (1982); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993). Drawing an analogy between two or more entities is to indicate one or more respects in which they are similar. The single most important feature of analogical reasoning is the existence of the "analogized" item of some particular characteristic(s) that allows one to infer the presence of that item of some particular other characteristic that may not be initially apparent. Every analogical inference proceeds from the similarity of two or more things in one or more respects to the similarity of those things in some further respect. For instance, a, b, c, and d all have properties X and Y. a, b, and c all have property Z. Therefore, d *probably* has property Z. Analogical arguments, which cannot be deductively valid, can still be more or less cogent depending on the degree to which their conclusions may be affirmed. However, two items compared can be alike or unlike in an infinite number of ways. Thus, there has to be an additional sort of constraint on analogical reasoning: relevance, which is dependent on the discursive context. Analogical argument aims for making the case for the relevant similarity between two items compared.

There are six criteria for appraising the soundness of an analogical argument: (1) the number of entities or instances, (2) the variety of the instances in the premises, (3) the number of respects in which the things involved are said to be analogous, (4) relevance, (5) the number and importance of disanalogies, and (6) the nature of the claim and the modesty of the conclusion affirmed. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 477-82 (10th ed. 1998). Drawing an analogy between two or more entities is to indicate one or more respects in which they are similar. If we have an earlier case that is sufficiently similar to the case at hand and one set of reasons had outweighed the other set, we can then argue that similar cases should be treated similarly and

appropriately.[29] By understanding its exercise, we can begin to understand the qualities that we ought to look for in candidates for the bench.[30]

This Article is divided into three main sections. Part I spells out the skeptical challenge to the rationality of legal reasoning, answers the charge that legal propositions cannot be true or false, and describes the cognitive process of applying abstract legal rules to concrete cases.[31] Part II examines Aristotle and Kant's thoughts on the operation of judgment in practical reasoning and contends that too much has been made of their purported differences.[32] Part III explains the nature of moral judgment in constitutional adjudication and puts forth a theory of what it means to exercise such judgment well.[33]

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perhaps, weigh the reasons like we did in the past. This does not mean that it is obvious that a past case is sufficiently similar to qualify as an analogy. At the very least, such a move would require argumentation. Indeed, we ought to expect new cases to differ in some respects from previous cases and for the strength of reasons to vary according to context and the extent to which they are stronger or weaker in combination with other reasons.

The impulse toward formalism in legal culture can partially be explained by the fact that all of us believe that fairness or equity requires that we treat like cases alike. The trick is to determine when two cases are sufficiently similar to warrant the same kind of treatment. Judges have a great deal of work to do, then, in figuring out whether two cases are truly analogous. In common law systems, appeal to precedent works as follows: The previous treatment of A in manner B constitutes, only because of its pedigree, a reason for treating A in the same way when it occurs again in a slightly different form. The relevance of an earlier precedent depends on how the facts of the earlier case were characterized. Although no two cases are factually identical down to the last detail—otherwise they would not have been litigated in the first place or would not have reached an appellate court—they may be sufficiently similar in the relevant respects for a judge to decide that the holding and rationale of a previous case is also applicable to the new case.

29. *See generally* CHARLES LARMORE, PATTERNS OF MORAL COMPLEXITY 1-21 (1986); Martha C. Nussbaum, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, *in* ARISTOTLE'S ETHICS: CRITICAL ESSAYS 145 (Nancy Sherman ed., 1999) [hereinafter Nussbaum, *The Discernment of Perception*]; MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS; LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 290-317 (1986) [hereinafter NUSSBAUM, THE FRAGILITY OF GOODNESS]; NANCY SHERMAN, THE FABRIC OF CHARACTER (1989); NANCY SHERMAN, MAKING A NECESSITY OF VIRTUE: ARISTOTLE AND KANT ON VIRTUE (1997) [hereinafter SHERMAN, MAKING A NECESSITY OF VIRTUE].

30. *But see* BLUM, *supra* note 19, at 46-47 (arguing that moral perception and moral judgment is not a unified capacity but rather consists in a "multiplicity of psychic processes and capacities" and that certain persons are better at perceiving certain kinds of particulars than other kinds).

31. *See infra* notes 34-117 and accompanying text.

32. *See infra* notes 118-41 and accompanying text.

33. *See infra* notes 142-86 and accompanying text.

## I. THE SKEPTICAL CHALLENGE TO THE RATIONALITY OF CONSTITUTIONAL INTERPRETATION

### *A. Radical Skepticism*

At the outset, anyone who defends any conception of judicial wisdom must address the skeptical challenge to the rationality of legal reasoning. After all, the view that the results of constitutional adjudication can be rationally justified has met stiff opposition from skeptics who believe that we ought to be suspicious of all claims to legal truth.[34] These skeptics insist that for every argument that supports a particular conclusion, there is an equally compelling argument that supports a different conclusion.[35] Roberto Unger writes, "[i]t will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible."[36] Richard Delgado insists that "[n]ormative discourse is indeterminate; for every social reformer's plea, an equally plausible argument can be found against it."[37] Duncan Kennedy maintains that interpretations are not better or worse but rather reflect ideological choice.[38] For these skeptics, it makes no sense to be committed to a particular legal position on the basis that one argument, all things considered, is better on the merits than opposing arguments. The very existence of a counterargument means that there is no rational way to adjudicate between competing arguments. As a result, normative commitments cannot be justified on the basis of better or worse reasons.[39]

This kind of skepticism about legal argumentation is part of a more general challenge to the very rationality of practical reasoning in human affairs. Skeptics allege that the interpretive latitude inherent in the exercise of judgment in real situations of choice means that the judgment's results cannot be rationally justified. This objection is premised on the belief that real states of affairs are too complex and interpretive traditions are too indeterminate to constrain

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34. *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 8-9 (1984).

35. *See* Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 716 (1994).

36. ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 8 (1986) [hereinafter UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT].

37. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 960 (1991).

38. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE 18 (1997).

39. As it stands, this skeptical argument that any argument is as good as any other argument is self-refuting insofar as the skeptic is making an anti-normative normative argument. In addition, that one could put together a poor argument that smoking is good for one's health or that the world is flat, for instance, hardly implies that the reasons, evidence, and inferences made on both sides of the question are equally strong. The mere existence of a bad argument with false premises and faulty inferences does not mean that all arguments are equally sound. In fact, it would be odd if someone could not develop a lousy argument for any particular wrong-headed conclusion.

judgments effectively, thereby making it impossible to draw a meaningful distinction between interpretation and invention. Agents are free to fill in the gaps with idiosyncratic tastes, emotional responses, and partisan politics. At times, it is difficult not to feel the pull of this objection because what counts as a judgment that everyone should accept can be reasonably contested when the case to be decided is morally and factually complicated. It appears that hard cases could fall under an infinite number of possible descriptions when the interpretive community is religiously, morally, and culturally heterogeneous like our own. It is highly improbable that a Catholic, libertarian, conservative, utilitarian, and Marxist will see the same facts of a particular political question as relevant and balance competing considerations in exactly the same way. Even people who employ the same normative language must differentiate plausible applications of their common abstract principles from less plausible applications and they may disagree not only on the criteria for application but also on whether that criteria has been satisfied in a particular case.[40] Those who support animal welfare, for example, are divided over whether vegetarianism is morally required.[41] Even those who characterize themselves as liberals disagree over a fairly large number of political issues.[42]

The less-than-certain character of legal argumentation has led some skeptics to the extreme conclusion that all such argumentation is rhetorical because no argument can be rationally grounded in a deeper moral reality. For them, there is no middle ground between Plato and Nietzsche. If reason cannot provide Cartesian certainty for a truth claim, then it cannot provide any support whatsoever. As Owen Fiss puts it, "[t]he nihilist would argue that . . . [for] the Constitution—there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values."[43]

This kind of skepticism in legal literature has a long pedigree.[44] The concern that legal reasoning could not yield determinate answers to any legal question was central to the Legal Realist Movement, which originated in American law schools in the 1890s, and to its successor, the Critical Legal Studies Movement. The Realists claimed that judges actually resolve legal controversies on the basis of their own moral and political tastes and then choose an appropriate rule to

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40. *Cf.* Ray Nichols, *Maxims, "Practical Wisdom" and the Language of Action: Beyond Grand Theory*, 24 POL. THEORY 687, 687 (1996) (writing that "[m]ost politics lies between pure practice and full-blown theory, in the province of wisdom in practice").

41. This disagreement cannot be explained by adherence to difference principles. See, for example, Tom Regan's account of why utilitarians such as Peter Singer and R.G. Frey disagree about the morality of vegetarianism in TOM REGAN, DEFENDING ANIMAL RIGHTS 14-15 (2001).

42. *See* STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 1-2 (1995).

43. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982).

44. Those who advocate legal realism, hermeneutics, feminist legal thought, and critical legal studies typically reject the claim that the law can be objective in the sense of providing politically neutral reasons for legal outcomes. *See* KENT GREENAWALT, LAW AND OBJECTIVITY 7 (1992).

rationalize the result that they have reached.[45] The inherently open texture of legal language makes it impossible to determine whether a particular legal conclusion is true or false.[46] Precedents could be twisted, moreover, to fit the result that the judge wants to reach.[47] The Realists' critique challenged the belief that proponents of formal legal reasoning could claim certainty for their legal conclusions.[48] When Oliver Wendell Holmes proclaimed that "[t]he life of the law has not been logic: it has been experience,"[49] what he meant was that legal reasoning cannot be strictly deductive. His main target was Christopher Columbus Langdell's apparent attempt to turn the law into a coherent collection of clear rules that would logically imply legal conclusions.[50]

The Realists believed that every judicial decision had two distinct characteristics: (1) that in any given case, more than one legal rule would always apply. In a contracts case, for instance, a judge must pay attention to a variety of different considerations: offer and acceptance, consideration, the meeting of the minds, fraud, revocation, remedies, and so forth. Because of these factors, all of which require interpretation, the law itself does not determine the outcome of the case (2) as the holding of a case could not be authoritatively distinguished from its dicta.[51] After all, a judge is always free to decide which rule is

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45. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 3.

46. *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 128.

47. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 38 (Peter Smith ed., 1970) (1930).

48. *See* MARK TEBBIT, PHILOSOPHY OF LAW: AN INTRODUCTION, 22-29 (2000). Today, very few legal theorists or lawyers believe that legal decision making can be reduced to subsuming the facts of a case under a rule and logically deducing the legal consequences. *See* JAAP C. HAGE, REASONING WITH RULES: AN ESSAY ON LEGAL REASONING AND ITS UNDERLYING LOGIC 1 (1997). In this sense, the Legal Realist movement put to rest the notion that legal reasoning could be strictly deductive. Recently, even those who have defended versions of legal formalism do not allege that the law must dictate particular results in all cases. *See, e.g.*, Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544-48 (1988).

49. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little Brown & Co. ed., 1938) (1881).

50. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

51. As Andrew Altman explains,

> Even when the judge writing an opinion characterized part of it as "the holding," judges writing subsequent opinions were not bound by the original judge's perception of what was essential for the decision. Subsequent judges were indeed bound by the decision itself, that is, by the finding for or against the plaintiff, and very rarely was the decision in a precedent labeled as mistaken. But this apparently strict obligation to follow precedent was highly misleading, according to the realists. For later judges had tremendous leeway in being able to redefine the holding and the dictum in the precedential cases. This leeway enabled judges, in effect, to rewrite the rules of law on which earlier cases had been decided.

Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208-09 (1986).

authoritative. As such, right answers to legal questions do not exist.[52]

### *B. Rebuttal*

These concerns are legitimate. At minimum, they ought to make us less certain of the merits of our moral and political judgments and more aware of our own fallibility. After all, historically, we have overlooked a number of egregious moral and political problems such as slavery, the genocide of Native Americans, and the oppression of women. Perhaps, even today, our treatment of animals is morally unacceptable.[53] For these reasons, we should always be hesitant to take for granted that how we have specified moral and political problems in the past is in fact correct.

As Aristotle first pointed out, we have to tolerate a certain amount of imprecision because of the non-codifiability of human judgments.[54] Skeptics try to capitalize on this point by employing an excessively demanding epistemic criterion of absolute certainty to support their claim that such judgments cannot be rationally justified.[55] This objection would have greater force if Americans did not share any of the same political values. Fortunately, norms like freedom, equality, and tolerance—at least at an abstract level—are no longer seriously contested.[56] At present, no one could seriously argue that a society that is truly dedicated to racial equality would tolerate the existence of Jim Crow laws or that a society that truly aspires to gender equality could refuse to educate women. Abstract notions like freedom and equality have a limited range of application in which they cover some kinds of behavior and not other kinds. Nor is language radically indeterminate in the sense that words have an unlimited range of meaning.[57] An English-speaker who refers to a telephone pole as an "artichoke"

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52. More recently, members of the Critical Legal Studies Movement also have tried to show legal outcomes are radically indeterminate. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT, *supra* note 36; Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Mark Tushnet and Joseph Singer maintain that legal rules never produce determinate results in real cases. MARK V. TUSHNET, RED WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 191-92 (1988); Singer, *supra* note 34, at 10-11.

53. *See generally* MARY MIDGLEY, ANIMALS AND WHY THEY MATTER (1983); TOM REGAN, THE CASE FOR ANIMAL RIGHTS; PETER SINGER, ANIMAL LIBERATION (1975); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000).

54. ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS (J.A.K. Thomson trans., 1953, Penguin Books 1986).

55. On objectivity in legal interpretation, see Fiss, *supra* note 43, at 739-773. On objectivity in moral reasoning, see MARY MIDGLEY, CAN'T WE MAKE MORAL JUDGEMENTS? (1991); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87-139 (1996).

56. ALAN WOLFE, ONE NATION, AFTER ALL (1998).

57. On the constraining effects of legal language, see Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981); Frederick Schauer, *An Essay on Constitutional Language*,

misunderstands the appropriate word for the referent. We may disagree over whether a particular shade of aqua is "blue" but not over whether it is yellow or red. The real issue, then, when a judgment has to be made, is to determine the range of plausible applications in a way that is acceptable to all reasonable people who speak a particular language.

The objectivity of a moral or political judgment does not depend upon finding a universal standpoint that exists outside of language and conceptual schemes. In fact, without making extravagant metaphysical assumptions, it is hard to make sense of the very idea that moral facts can be "out there," floating around like particles in space. To claim that concentration camps are evil is not necessarily to make a claim about the ghostly nature of the physical world. Instead, such a moral proposition is better understood as a truth claim about what we know about human dignity and the resources that people need to live decent lives. In other words, even if there were no moral truths built into the structure of the universe, there still are morally relevant facts about human beings, based on our knowledge of human psychology, biology, and physiology, which any plausible moral theory must take into account. Part of the problem is that the skeptic seems to be insisting on far too stringent an account of what it means to have support for moral or legal judgments. After all, law is interpretative.[58] As Martha Nussbaum writes, "[f]or it is only to one who is attached to the existence of a transcendent ground for evaluation that its collapse seems to entail the collapse of all evaluative argument and inquiry."[59]

The other obvious difficulty with extreme forms of skepticism toward the rationality of moral and legal reasoning is that the skeptic herself is putting forth a sweeping truth claim.[60] As Dworkin has pointed out, the no-right-answer thesis, which is predicated on the assumption that reason cannot arbitrate between two arguments that appear to be equally cogent, must be defended like any other truth claim.[61] The skeptic cannot simply pretend that her skeptical claim about the existence of moral truth is not itself a claim about how the world really is.

Moral principles themselves may not give us an uncontested right answer in hard cases, but they still can help us exclude obviously wrong answers, thereby reducing the range of plausible answers and setting the agenda for further moral, political, and legal deliberation.[62] A claim that no such judgment can be better than its rivals must be defended like any other truth claim about the world. It does not follow from the mere existence of differences of judgment in hard cases that disagreement is inevitable or that all judgments square with the particular

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29 UCLA L. REV. 797, 809-812, 824-831 (1982).

58. *Cf.* James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 842 (1986).

59. Nussbaum, *supra* note 35, at 739-40.

60. As David McNaughton writes, "To believe something is to believe that it is true." DAVID MCNAUGHTON, MORAL VISION: AN INTRODUCTION TO ETHICS 7 (1988).

61. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 280-85.

62. Obviously, more generally, principles cannot make our decisions or do our appraising for us.

facts of the case equally well.[63] The specification of particular moral or political problems is no more immune from rational criticism than is the formulation of moral theories more generally.[64] In understanding the nature of judgment, we must avoid two errors: seeing all cases as hard cases or viewing them as easier than they really are and thus, concluding that practical reasoning can be deductive or mechanistic.[65] In both extremes, the trouble lies in the failure to understand what the exercise of human judgment can reasonably be expected to accomplish.

As citizens deliberate over matters of shared importance, good judgment sets the agenda for the moral conversation of a democratic society, increasing the likelihood that they will not talk past one another despite their deeper disagreement over the nature of the human good. In easier cases, the goal is to reach the best answer according to the facts of the case, their relationship to common political values, and the likely consequences. In more difficult cases, the objective may be less ambitious: to remove some of the interpretive uncertainty surrounding the application of shared political principles in constructing the most appropriate moral response that is possible despite the imperfections of human institutions. The right course of action is supported by the best reasons, all things considered.[66] Citizens need not give sophisticated philosophical explanations of the foundations of their political morality but they must be able to apply its principles competently when they deliberate with their fellow citizens and vote on the most fundamental political questions. Appeal to general principles alone will not get us very far in resolving political controversies fairly. As much as possible, our judgments in real cases must converge as well.[67]

Many of the most important controversies in constitutional law boil down to how particular words of the Constitution (and the cases that have interpreted them over time) are best understood in light of the particular facts of the case and the norms of our political morality. Legal commentators unanimously agree that the death penalty implicates the "cruel and unusual punishment" part of the Eighth Amendment but disagree on the exact circumstances that might trigger a constitutional prohibition on capital punishment. All of them would see

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63. For the famous argument that most hard cases have right answers, see DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 119-45.

64. Onora O'Neill, *How Can We Individuate Moral Problems?*, *in* APPLIED ETHICS AND ETHICAL THEORY 84, 99 (David M. Rosenthal & Fadlou Shehadi eds., 1988).

65. There is voluminous literature in jurisprudence that denies that legal reasoning can be deductive in the sense that legal conclusions can be deduced from legal principles. *See, e.g.*, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 165-85 (1985); David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178 (1984).

66. *See* James Rachels, *Can Ethics Provide Answers?*, *in* APPLIED ETHICS AND ETHICAL THEORY, *supra* note 64, at 3, 13.

67. This does not mean that principles of justice should not be designed to secure the assent of all reasonable citizens. *See* BRIAN BARRY, POLITICAL ARGUMENT: A REISSUE WITH A NEW INTRODUCTION, at lxxi-lxxii (1990).

crucifixion, drawing and quartering, and stoning as both "cruel" and "unusual." But they are apt to disagree as to whether capital punishment itself is cruel and unusual, whether the Constitution bans imposition of the death penalty for the crime of rape, whether judges (instead of juries) may sentence defendants to death, and whether the mentally retarded or adolescents may be put to death for capital crimes. In fact, much of the argument in hard cases takes place at a lower level of description where the characterization of the particulars is often decisive in determining the result.

Here, high-level theories of constitutional interpretation are not terribly helpful. Nor do the words of the most important constitutional provisions provide much guidance when we need to know what constitutes speech in the first place or how free press concerns ought to be balanced against the equally important right of a defendant to receive a fair trial. Agreement on the mere words of particular constitutional provisions does not ensure that two appropriately motivated judges will reach the same decision. In fact, even judges who adhere to the same grand theory of constitutional interpretation may reach opposite results when they have characterized the facts of the case differently.

All of us would agree that beating a puppy with a stick amounts to "animal cruelty," that executing unarmed civilians constitutes a "massacre," and that mass murder with the intention to wipe out an entire ethnic group counts as "genocide." If it were impossible for a jury to apply the legal concept of a "hostile" work environment in determining whether a series of particular incidents falls under its definition, then no one could ever be held liable for that sort of sexual harassment even in the most egregious of cases.[68] We expect normal adults to behave in reasonable ways in all kinds of settings and those who do not behave appropriately may be subject to social ostracism, criminal prosecution, and civil litigation. Intersubjective agreement on easy cases also contains the rough criteria for making relevant distinctions in progressively more difficult cases. Because the differences that are likely to divide us lie in so-called gray areas, we need a better understanding of why hard cases are hard or whether, indeed, they are as hard as we imagine them to be.

Most, if not all, words have fringe and core applications in that it is impossible to formulate an all-inclusive definition of any word that would cover all possible uses.[69] Fringe applications invite us to argue for inclusion or exclusion. Yet the existence of such applications does not mean that there are no core cases in which an argument on one side is obviously better than opposing arguments are when we share at least some of the same criteria for application. Not all cases are hard in that we are always forced to choose between two equally plausible descriptions. Some human actions are so self-evidently evil that after very little reflection, or none at all, one is able to disapprove of them.[70] The

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68. *See* The Fair Employment and Housing Act, CAL. GOV'T CODE § 12940(a), (j)-(k) (West 1992 & Supp. 2004) (addressing sexual harassment in the workplace).

69. *Cf.* MARY MIDGLEY, WICKEDNESS: A PHILOSOPHICAL ESSAY 45 (1984).

70. Even Michael Walzer, who is skeptical of universal moral claims, acknowledges that certain prohibitions "constitute a kind of minimal and universal moral code." MICHAEL WALZER,

presence of easy cases strongly supports the claim that only moderate indeterminacy exists in the application of moral and legal principles and shifts the burden of persuasion to skeptics who endorse a thesis of radical indeterminacy.

### *C. Moderate Skepticism*

At the same time, even those who have not succumbed to this extreme form of skepticism about the very possibility of rational legal argumentation are far less certain than they used to be about the ability of human reason to ground legal decisions.[71] They fear that legal language, which often appears to be indeterminate, may prevent them from convincing all reasonable members of the legal community that the arguments that justify constitutional decisions are sound.[72] As one commentator notes, "[t]he law, however, is not so clear, consistent, and complete that it constrains judges to reach a single legally required outcome in many cases."[73] The essence of the problem is that the vast majority of applications of legal principles or rules require substantive choice on the part of the judge.[74] This choice is unavoidable, skeptics allege, and its very existence undermines the purported objectivity of legal reasoning. For instance, in a common law system, the relevance of an earlier precedent hinges upon how the judge characterizes the facts of the case and distinguishes the relevant similarities and differences.[75] Because legal argumentation is not formal argumentation, conclusions do not follow deductively from premises.[76] A judge can only apply a legal provision after she has framed the legal issue. This freedom to characterize the facts, as skeptics would have us believe, means that the law does not constrain legal interpretation.

Consider questions of constitutional law. The constitutional text itself produces the major premise of a practical syllogism, such as "cruel and unusual punishments" are prohibited. Whether a mentally retarded defendant can be executed, however, is left to the discretion of the judge. The judge herself must formulate the minor premise, which incorporates the morally relevant particulars and connects them to the case law, before reaching a conclusion. The minor

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INTERPRETATION AND SOCIAL CRITICISM 24 (1987).

71. On this point, see Nussbaum, *supra* note 35, at 716-17.

72. For purposes of simplicity, the Author limits his discussion to instances of constitutional interpretation.

73. STEVEN J. BURTON, JUDGING IN GOOD FAITH 7 (1992).

74. *See* H.L.A. HART, *supra* note 17, at 123. Dworkin denies that judges have "discretion" in the sense that their judgment is unconstrained. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 17, at 31-39. Indeed, this is one of the main points that separate Dworkin from his positivistic critics. When explicit legal rules run out, Dworkin believes that a judge still can fall back on legal principles and policies that are also part of the law. As such, a judge does not have unfettered discretion to choose how to proceed.

75. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 577 (1987).

76. *See* STUART HAMPSHIRE, JUSTICE IS CONFLICT 64 (2000).

premise picks out what is salient in the circumstances and thus, is likely to be very detailed. The problem is that the content of this premise requires the cognitive input of the judge; it is never simply given by the facts themselves. The task of rational justification is considerably more complicated under such conditions because what counts as a good argument, or even what counts as a good reason, may be reasonably contested. Even Ronald Dworkin acknowledges that ties, albeit rare, are possible in hard cases.[77] Moreover, in most controversial cases, no interpretation of the law is likely to fit the facts perfectly.[78] Even under the best of epistemic conditions, then, some of the most important decisions of constitutional law may be open to dispute because they have not been settled to the satisfaction of every reasonable member of the legal community.[79]

### *D. The False Dichotomy*

Other skeptics, such as Stanley Fish, have attacked principles themselves:

> The trouble with principle is, first, that it does not exist, and second, that nowadays many bad things are done in its name. . . . The problem is that any attempt to define one of these abstractions—to give it content—will always and necessarily proceed from the vantage point of some currently unexamined assumptions about the way life is or should be, and it is those assumptions, contestable in fact but at the moment not contested or even acknowledged, that will really be generating the conclusions that are supposedly being generated by the logic of principle.[80]

Although Fish is justified in calling attention to the difficulty of relying upon principles alone to ensure appropriate moral responses, it is peculiar to refer to "a logic of principle." A principle cannot apply itself or single out the morally significant dimensions of the case at hand. Nor can a principle be blamed for being misused or abused to serve morally objectionable ends. Language can be manipulated but that rhetorical possibility should not surprise us. While we should censure the framers of the Constitution for not seeing the evil of slavery and for not recognizing the moral, political, and social implications of the concept of equality, it is a bit odd to blame principles of freedom and equality themselves for injustice rather than the human agents who misapplied such principles over time in self-serving ways.

Nonetheless, Fish asserts that principles are "unoccupied vessel[s] waiting to be filled by whatever gets to [them] first or with the most persuasive force."[81] This assertion is based on his belief that an agent's conceptual contribution in

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77. DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 143.

78. *Cf.* Ken Kress, *The Interpretive Turn*, 97 ETHICS 834, 845 (1987).

79. *Cf.* CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 8 (1989) ("[T]here is no unambiguous principle of equal power that can plausibly be taken as a basis for resolving the dispute in all of these areas.").

80. STANLEY FISH, THE TROUBLE WITH PRINCIPLE 2-3 (1999).

81. *Id.* at 7.

putting together the pieces of the puzzle, so to speak, vitiates the objectivity of her description of the circumstances of choice. To his credit, Fish correctly points out that we should appreciate the limits of principles in practical reasoning. After all, a principle cannot be so detailed as to preclude the possibility of a disputed application. At the same time, it is a philosophical mistake to believe that we are forced to choose between the abstract and the concrete.[82] One does not have to be a Hegelian to appreciate that abstract principles have social expressions. Indeed, our own political disagreements are often more about the implications of the principles to which we adhere—such as freedom, equality, fairness, and desert—than about the principles themselves. An important part of the practice of democratic politics involves deciding whether our political vocabulary ought to be extended in novel ways. Before the 2000 presidential election, most of us did not appreciate the extent to which outdated punch-card voting machines might disenfranchise voters and thus, infringe upon their fundamental right to vote.

New cases appear and test the meaning of these abstract principles. The act of application, which requires attention to actual details, draws upon additional human faculties that lie outside of these principles.[83] The responsibility of rendering real situations morally intelligible, then, rests upon the shoulders of the human agent. The facts themselves are context-specific and thus, any real situation of choice is bound to be somewhat unique. People react to what they see and conversely, they do not react to what they do not see. For this reason, an agent who is conscientiously devoted to the right principles may not respond appropriately. That does not mean, though, that the principle itself is at fault, as if a principle could be correctly applied without sensitivity to the actual circumstances of application. In fact, moral failure cannot always be traced back to the principles themselves in the sense that the person acted upon the wrong principle. After all, an agent who does not describe a situation of choice in sufficient moral detail may simply fail to put a moral principle into practice despite her most sincere intentions. Indeed, for this reason, even conscientious moral agents can make poor decisions.[84]

The above statement also suggests that Fish believes that it is self-evident that words have an unlimited range of application and therefore, principles can be twisted to rationalize any kind of immoral or evil behavior. The crux of his position would be this: even if we were to achieve consensus on abstract legal norms, this consensus would break down the moment that we began to assess the

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82. *See* MARK TUNICK, PRACTICES AND PRINCIPLES: APPROACHES TO ETHICAL AND LEGAL JUDGMENT 221 (1998).

83. Richard Miller labels this faculty "interpretive perspicuity." Richard B. Miller, CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING 223 (1996).

84. The Author is not claiming that people never act on the basis of self-interested, sociopathic, or evil reasons. Rather, the point is that moral failure cannot always be reduced to having the wrong motive or having bad character. In fact, moral failure can often be traced to moral negligence or recklessness on the part of the agent who fails to see what a reasonable person should have seen.

particulars of real cases because the actual application of abstract legal notions is not meaningfully constrained. The purported constitutional consensus that we have only consists of a consensus of mere words that cannot help us to resolve real legal controversies. Some of us would frame the issue to be decided in idiosyncratic ways and others would weigh competing considerations differently, leading to a wide range of different legal conclusions, none of which could be said to be more rationally defensible than its rivals. As such, the practice of legal reasoning is susceptible to the skeptical charge that we should not have any epistemic confidence in the conclusions that judges reach because the reasons that they offer as support fall far short of proof. Moreover, we cannot know whether that the agent has followed the rule or principle correctly.[85] After all, principles are too weakened by their necessary abstractness to tell us what to do in particular circumstances.[86]

This objection is the most serious challenge to the rationality of the practice of constitutional interpretation, and legal reasoning more generally, because it is rooted in the theoretical possibility that such reasoning could never live up to its aspirations even under the best of circumstances. For this objection to be decisive, however, its proponents would need to show that legal language is always radically indeterminate, that is, that the malleability of terms such as "free speech," "due process," and "equal protection" renders them meaningless. The norm-governed practice of constitutional argumentation and adjudication shows that this is not the case. The words of the Constitution meaningfully limit the range of legal conclusions that a judge could reasonably reach in a particular case.[87] Indeed, the very existence of easy cases cuts against any skeptical claim that legal language is radically indeterminate.[88]

Even more basically, this view of language is counterintuitive insofar as it is belied by our everyday experience as users of language within a particular linguistic community and by our ability to communicate with one another. The meaning and reference of our terms is given by the nature of the world.[89] The belief that words have no core applications is mistaken because words cover some phenomena but not all phenomena, even when a number of hard cases may lie at the margins. Some legal answers are clearly wrong and some legal arguments are clearly unpersuasive.[90] At the very least, we are entitled to an argument that supports the conclusion that moral or legal language is radically indeterminate. The real trouble, one is tempted to say, is not with principle but

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85. *Cf.* Philip Pettit, *The Reality of Rule-Following*, 99 MIND 1 (1990).

86. *See, e.g.*, Tom L. Beauchamp, *On Eliminating the Distinction Between Applied Ethics and Ethical Theory*, 67 MONIST 514, 519 (1984).

87. *See* Frederick Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797, 809-12, 824-31 (1982).

88. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); *cf.* Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1 (1990); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

89. Brink, *supra* note 20, at 105, 123.

90. *See* GREENAWALT, *supra* note 44, at 6.

with the skeptic's inability to distinguish between good and bad applications of words or principles to real events. That language is not radically indeterminate in all cases ought to make us skeptical of the skepticism of those who allege that there are no straightforward applications.

At the same time, weaker forms of skepticism in legal thought must be taken more seriously. The concern is that the application of a legal rule is severely underdetermined by the facts. H.L.A. Hart traces the indeterminacy of legal rules to two sources: (1) "our relative ignorance of fact" in that we cannot foresee all of the possible applications of a rule when we formulate it and (2) "our relative indeterminacy of aim" where unforeseen empirical features can change the aim of the applicable rule.[91] For these reasons, legal rules have an "open texture."[92] It does not follow, though, that this open texture holds equally for all cases, no more than a text can be read in any old way without reference to the words, authorial intent, and to its context.[93] Some interpretations of a text are much less controversial than others in light of the evidence that has been mustered on their behalf. While for Hart hard cases are left to the discretion of the judges because the law has run out, the right answers to less difficult cases are more or less self-evident in a legal community that shares the same general interpretive norms.

This point is equally true of other phenomena in political life. An election that is rigged, for instance, is not a fair election. That does not preclude the possibility that someone may try to defend an alternative interpretation of an event in the present or a new interpretation of it in the future that may ultimately be accepted. The history of political thought is full of the attempts of political writers to take in new directions the conventional political vocabulary of the time to legitimate particular political actions.[94] In retrospect, new facts or understandings may compel us to reassess our prior judgments. Indeed, we ought to expect disagreement about how a principle applies to the hard case under discussion.[95] Otherwise, the case would not be hard in the first place.

In addition, we should be willing to revisit hard cases and welcome the opportunity to become more familiar with the possible implications of

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91. HART, *supra* note 17, at 125.

92. *Id.* at 121-32.

93. *See* E.D. HIRSCH, VALIDITY IN INTERPRETATION (1967).

94. As Quentin Skinner has written, "The ideologist's aim in this case is to insist, with as much plausibility as he can muster, that, in spite of any contrary appearances, a number of favourable evaluative-descriptive terms can in fact be applied as apt descriptions of his own apparently untoward social actions." Quentin Skinner, *Analysis of Political Thought and Action*, *in* MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 115 (James Tully ed., 1988). The point of this strategy is to challenge his ideological opponents to reconsider whether they may be making an empirical mistake (and may thus be socially insensitive) in failing to see that the ordinary criteria for applying an existing range of favourable evaluative-descriptive terms may be present in the very actions they have been condemning as illegitimate. *Id.* This point can be extended beyond crude ideological attempts to advance sectarian political agendas.

95. ANNE THOMSON, CRITICAL REASONING IN ETHICS: A PRACTICAL INTRODUCTION 42 (1999).

constitutional language on the assumption that our moral judgment is fallible yet nevertheless may improve over time as we come to understand the specifications of abstract political values such as freedom and equality. The cases in which the conditions of application are unclear should not bother us in the sense that we should doubt the rational justification of every single application. It is simply a philosophical mistake to infer from the existence of hard cases that all cases are equally hard.[96] An unrealistic demand for deductive certainty in legal reasoning can lead to the belief that if we fall short of this epistemic standard, then no result of legal reasoning can be said to be any better than any other result. This demand ignores the fact that non-deductive arguments can be based upon very strong reasons and overwhelming evidence.[97]

We do not need to know beyond a shadow of a doubt that a particular course of action is right before we act.[98] But at the very least, as citizens, we still must give good reasons for our collective decisions, reasons that are both fair and context-sensitive, to legitimate them. There is a premium, then, on identifying all of the possibly relevant reasons in the first place. These reasons are candidates, so to speak, for deciding what to do. This identification step excludes some considerations on the grounds that they are not relevant. That a person has red hair, for example, should not bear on whether she has a right to vote. Whether the person is an ex-felon, by contrast, may have some bearing, even though this fact should not be dispositive. We cannot say that one case should be decided one way, but a similar case should be decided differently, unless there is a relevant difference between them.

Constitutional protection for a Nazi march would appear to deserve the same constitutional protection as that of a KKK speech. In the absence of relevant differences, it cannot be right to treat these cases differently. On the other hand, that Nazism is directly related to the Holocaust might provide the relevant difference.[99] One of the most important judicial tasks involves screening out irrelevant considerations. When irrelevant considerations have been eliminated, what is then left is a number of possible reasons that must be assigned weight in determining the right course of action. The result is that the degree of determinacy that one can expect in a particular case is contingent upon the circumstances of that case.[100] Practical discourses, like that of law, differ from those of the natural sciences and mathematics in that the kind of determinacy that is aspired to is bound to be much weaker.[101]

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96. *Cf.* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 2, at 168.

97. As Catherine Elgin puts it, "[t]o know something it seems is to be epistemically entitled to confidence about it." CATHERINE Z. ELGIN, CONSIDERED JUDGMENT 21 (1996).

98. In political science literature, "bounded rationality" means that our imagination and calculating abilities are limited and fallible. James D. Fearon, *Deliberation as Discussion*, *in* DELIBERATIVE DEMOCRACY 44, 49 (Jon Elster ed., 1998).

99. I owe this example to Sunstein, *supra* note 28, at 745.

100. *Cf.* BURTON, *supra* note 73, at 108-17.

101. Conservative jurists often use a strong determinacy condition as the central premise in their argument for judicial restraint in the name of democratic self-rule. The idea is that to be

Where does that leave us? Does the apparent abstractness of constitutional language render it useless in deciding what to do? The most effective response to this sort of skepticism about the role of principles in guiding behavior is to deny the assumption that principles are abstract in the sense that they cannot take social forms or be contextualized. The implications of abstract constitutional provisions are to be worked out by judges when they confront real cases. The role of the judge is to connect these abstract norms to the legal events that occur in the real world. In a very Hegelian manner, constitutional norms are embodied in the actual practice of constitutional interpretation. Abstract norms are mediated by real circumstances and thus, given substantive content. Indeed, the application itself changes the understanding of the principle.[102] Principles such as freedom, equality, and fairness lose their abstractness once they are subject to supplementary interpretation and normative argumentation over time.

We understand the implications of the free speech clause, for instance, only when we confront new problems that clarify how its language might be extended to cover novel cases. For example, is "tagging" a form of freedom of expression that deserves some degree of constitutional protection? If so, how should this right be balanced against the equally important consideration of protecting public property? Without knowledge of such cases, it is unclear in what sense an interpreter could claim that she understood the meaning of the free speech clause. To understand the words is to understand how they have been applied in the past and might be applied in the future. In short, Fish draws a very sharp distinction between principle and practice that relies on a false dichotomy between the abstract and the concrete.

Nevertheless, hard cases exist. In jurisprudence, a hard case is a case in which there are no clear rules that are applicable and precedents cut both ways.[103] Hard cases are "hard" in the sense that they raise highly controversial legal issues over which lawyers and judges may reasonably disagree.[104] For H.L.A. Hart, such cases exist because legal rules are formulated in general terms and, consequently, have meaning that extends beyond their "core" meaning into the "penumbra," where the law does not determine their meaning.[105] As such, judges cannot decide such cases on legal grounds but must use their discretion. For Ronald Dworkin, when two lawyers or judges are sincerely disagreeing about what the law is on some hard legal question, they are "disagreeing about the best constructive interpretation of the community's legal practice."[106] Hard cases are

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principled, legal reasoning must be as mechanistic as possible. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

102. James J. Keenan et al., *Contexts of Casuistry: Historical and Contemporary*, *in* THE CONTEXT OF CASUISTRY 221, 226 (James F. Keenan & Thomas A. Shannon eds., 1995).

103. SAMAR, *supra* note 20, at ix.

104. Brink, *supra* note 20, at 105-06.

105. HART, *supra* note 17, at 121-32.

106. DWORKIN, LAW'S EMPIRE, *supra* note 4, at 225.

also hard because the empirical evidence may be conflicting and complex, deliberators may disagree about the weight of the same considerations, words and concepts can be vague, their life experiences may differ, and they may give different priority to different normative considerations.[107] For these reasons, in hard cases, the application of legal rules does not always yield obvious answers that are beyond reproach. Hard cases dramatically increase the likelihood that principled judges will have different sets of equally good reasons for reaching opposite conclusions.[108]

### *E. The Application of Legal Norms*

In such cases, we should not expect a knockdown argument in favor of one legal result that would convince the most skeptical of skeptics. That is an epistemic standard that is simply inappropriate for assessing the truth of legal propositions or the soundness of legal arguments. As a result, in hard cases, it may not be possible to prove to the satisfaction of every reasonable member of the legal community that the application in question is the most rationally justified application compared with all of the other alternatives. Under these circumstances, the words may be broad enough to yield a number of different interpretations, leaving to the judge the task of figuring out which application is most rationally defensible in light of her best understanding of the totality of the circumstances.

This discretion, though, is not arbitrary, as skeptics maintain. The reasons that are supposed to justify the decision still must be the strongest reasons available based on the wording of the applicable constitutional provision(s), authorial intent, accepted norms of legal interpretation, the facts, applicable precedent(s), the probable consequences, and the values of our political morality. To be sure, the law itself does not dictate the answer in the sense that a premise logically implies a conclusion.[109] But one interpretation of the law could be said to support one conclusion, all things considered, better than rival interpretations on the basis of the above criteria. In the vast majority of cases, the law is sufficiently clear to determine an answer for all practical purposes and therefore, to hold people legally responsible for their actions. It is hard to imagine, for instance, that today two judges would disagree on whether a state could be deprived, without its consent, of equal suffrage in the United States Senate or on whether a twenty-year old could be elected as president. In short, a constitutional provision that is abstract is not necessarily empty.

At the same time, the range of application of a legal rule is likely to be

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107. *Cf.* JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* THE LAW OF PEOPLES 177 (1999); RAWLS, JUSTICE AS FAIRNESS, *supra* note 15, at 35-37; RAWLS, POLITICAL LIBERALISM, *supra* note 16, at 54-58.

108. *Cf.* BURTON, *supra* note 65, at 13.

109. On the possibility of semi-deductive legal reasoning, see NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978).

underdetermined at times.[110] As Frederick Schauer points out, terms like "liberty" and "equality" are pervasively indeterminate in the sense that their application to real cases requires supplementary premises.[111] On the edges of the meaning of abstract terms, the application of a rule involves a choice that the words of the rule alone do not determine.[112] In fact, all modern legal systems include norms that are vague in this respect.[113] We know, for instance, that the Fourth Amendment prohibits unreasonable searches and seizures. A judgment about what is "unreasonable," though, is often highly contextual, turning on the particular features of the case at hand.[114] As such, in some cases, we are bound to disagree in good faith about what counts as a "reasonable" search. We may even reasonably disagree about what constitutes a "search" in the first place, that is, about when a person has a "reasonable expectation of privacy."

People who adhere to the same abstract principles may have very different ideas about what those principles require, especially in controversial cases. For instance, most Americans are committed to racial equality in the abstract but they do not have the same beliefs about what sorts of public policies ought to follow from this moral commitment. They disagree over whether affirmative action in higher education furthers such equality and to what extent the race of an applicant should be taken into account in making admissions decisions. In a sense, then, it is not clear exactly what we mean when we claim that as a society, we believe in racial equality beyond a mere consensus on the words.[115] It is not uncommon for the electorate to endorse general moral principles such as freedom and equality yet to be reluctant to put such principles into practice.[116] A majority of Americans believe that gays and lesbians should have "equal rights in terms of job opportunities" yet more than half of those surveyed would deny the right of homosexuals to work as elementary school teachers.[117]

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110. For an argument about the difficulty of applying legal rules in a straightforward manner, see Gregg, *supra* note 23, at 357-78.

111. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 514 (1988).

112. *Id.*

113. *See* Gavison, *supra* note 5, at 1618, 1625.

114. This interpretive problem is not confined to general normative language that invites interpretation. For instance, the Constitution stipulates that the President of the United States must be a "natural born citizen," must be at least thirty-five years old, and must have been "fourteen years a resident within the United States." *See* U.S. CONST. art. I, § 1. While these words seem to be unambiguous, the text does not tell us what it means to be a "natural born citizen" or what kind of actions would qualify for residency. Conceivably, a case could arise where it might be unclear whether a person had met these requirements. What would happen, for instance, if a presidential candidate had been born in an U.S. embassy abroad?

115. On the problem of the application of legal terms, that is, on what he calls "problems of the penumbra," see Hart, *supra* note 1, at 17-37.

116. HERBERT MCCLOSKY & JOHN ZALLER, THE AMERICAN ETHOS: PUBLIC ATTITUDES TOWARD CAPITALISM AND DEMOCRACY 84 (1984).

117. *Id.* at 85.

## II. A BRIEF HISTORY OF JUDGMENT

### *A. Kant and Aristotle*

In this section, the Author would like review Kantian and Aristotelian approaches to judgment and make the case that these approaches are more similar than they may initially appear to be. Although neither focuses on moral or political examples, both Kent and Aristotle see judgment as a matter of properly relating universals to particulars. The problem of application cannot simply be treated as a matter of having the right principles because whether an agent can appreciate their possible implications requires more than theoretical understanding. As Kant wrote:

> It is obvious that no matter how complete the theory may be, a middle term is required, providing a link and a transition from one to the other [practice]. For a concept of the understanding, which contains the general rule, must be supplemented by an act of judgment whereby the practitioner distinguishes instances where the rule applies from those where it does not. And since rules cannot in turn be provided on every occasion to direct the judgment in subsuming each instance under a previous rule (for this would involve an infinite regress), theoreticians will be found who can never in all their lives become practical, since they lack judgment.[118]

In this passage, Kant points out that a person can be theoretically knowledgeable but at the same time lack the ability to put that knowledge into practice because she cannot formulate what Kant calls a "middle term," a description of the circumstances that warrant application of the rule. To exercise judgment is to give content to this middle term, that is, to predicate universals of particulars in deciding whether the case at hand falls under the more general principle. In this way, judgment closes the gap between the abstract principle and the concrete facts, safeguarding us against stupidity.[119]

Kant is aware that the subsumption of a particular under a universal in the making of judgments requires a separate cognitive faculty. However, because moral philosophers have paid so much attention to the role of Kant's Categorical Imperative in his moral philosophy, most of the literature on the topic, until recently, has had little to say about the kind of moral judgment that an agent must exercise in making morally permissible choices.[120] On the standard interpretation

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118. Immanuel Kant, On the Common Saying: *"This May be True in Theory, but It Does Not Apply in Practice," in* KANT: POLITICAL WRITINGS 61 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1970) (1793).

119. IMMANUEL KANT, CRITIQUE OF PURE REASON, at A 134, B 173 note a (Norman Kemp Smith trans., 1965) (1787).

120. A number of neo-Kantians have recognized that moral judgment must be more fine-grained than merely following rules. *See, e.g.*, ONORA O'NEILL, CONSTRUCTIONS OF REASON (1989); Herman, *supra* note 9.

of Kantian ethics, the Categorical Imperative is supposed to provide a decision procedure for right action by testing proposed maxims for their moral permissibility. Kantians are concerned with ensuring that such maxims can be generalized and thus, tend to overlook the equally important task of being able to survey carefully the actual context of choice. They are interested in determining whether proposed maxims can be acted upon, focusing their attention on the will of the moral agent and the extent to which her willings are sufficiently constrained.[121]

To complicate matters, it is very hard to pin down exactly what Kant meant by judgment because his most provocative remarks on the subject appear in his non-moral writings:

> A physician, a judge, or a ruler may have at command many excellent pathological, legal, or political rules, even to the degree that he may become a profound teacher of them, and yet, none the less, may easily stumble in their application. For, although admirable in understanding, he may be wanting in natural power of judgment. He may comprehend the universal *in abstracto*, yet not be able to distinguish whether a case *in concreto* comes under it.[122]

For Kant, the ability to apply rules is contingent upon a cognitive faculty that cannot be rule-governed.[123] Judgment is our capacity to apply such rules, to see something as the sort of thing that those rules pick out, subsuming a particular instance under a general rule.[124] Exactly what this process involves, though, is left unspecified. While Kant characterizes judgment as a "natural gift" and claims that deficiency in judgment cannot be remedied, he also states that examples and actual practice can sharpen the faculty.[125]

This passage indicates that outside of ethics, Kant clearly understood the difference between intellectually comprehending an abstract principle and discerning whether the principle covers a particular case. Yet his lack of attention to this topic in his moral writings suggests that he did not fully appreciate the significance of the exercise of judgment in matters of moral choice, perhaps taking for granted that most people could see what they needed to see to act appropriately.[126] For Kant, to have virtue is to be constrained by principles that derive from the rational nature of human beings and to resist turning desires into maxims of action that cannot be universalized. It is more or

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121. *But see* Barbara Herman, *Making Room for Character*, *in* ARISTOTLE, KANT, AND THE STOICS: RETHINKING HAPPINESS AND DUTY 36-60 (Stephen Engstrom & Jennifer Whiting eds., 1998).

122. KANT, *supra* note 119, at 178, A 134, B 173.

123. *See* LARMORE, *supra* note 29, at 3.

124. *Id.* at 4.

125. KANT, *supra* note 119, at 178, A 134, B 173.

126. On the other hand, Kant himself ends *The Metaphysics of Morals* with "casuistical" questions. IMMANUEL KANT, THE METAPHYSICS OF MORALS 182-88 (Mary Gregor trans., 1996) (1797).

less assumed that a sincere moral agent has a sense of what the Categorical Imperative demands of her most of the time. The moral struggle lies in the difficulty of inhibiting actions and impulses that are incompatible with that principle of universalizability and not in the difficulty of specifying what kind of action the principle requires in concrete circumstances.

In the opening passages of *The Nichomachean Ethics*, Aristotle tells us that to choose well is to ask the right questions and to identify the particulars that ought to be considered in the decision-making process.[127] Aristotelian practical reasoning is not deductive in the sense that a conclusion is strictly entailed by the major premise of a practical syllogism.[128] To see a real situation of choice accurately is not to infer conclusions from premises as in formal logic but to appreciate the relationship between the various relevant considerations and to strike a reasonable balance among them. The practically wise person knows when one fact, as a reason for an action, affects the relative strength of other reasons and may override them.

Consider the following example. Aristotle claims that a courageous person locates the mean relative to herself.[129] Such a person is neither too rash nor too meek in light of the available options. A practically wise person who was leading a military expedition, for example, would only attack the enemy at the right time, at the right place, and in the right way if such an attack were likely to succeed or to further another more important tactical or strategic objective. By contrast, a commander who lacks such wisdom is likely to attack when such an attack is not warranted or conversely, not to attack when such an attack would be opportune. To have courage is not to make unnecessary sacrifices. Real courage is a matter of deciding what is the most appropriate response based on the best possible reading of the particular circumstances. A response that might be too rash under certain conditions might be perfectly appropriate in another set of circumstances. The devil is in the details. Choosing as wisely as possible, then, hinges upon an accurate assessment of the relevant facts, that is, understanding why some facts matter more than others, and why some facts, coupled with others, cut for or against a particular course of action. A virtuous person does not just have virtues but also possesses the cognitive ability to grasp the particulars that ought to bear on her decision.[130]

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127. *See* NUSSBAUM, THE FRAGILITY OF GOODNESS, *supra* note 29, at 10.

128. *See* Nussbaum, *The Discernment of Perception*, *supra* note 29, at 145-46.

129. The use of the term "mean" is unfortunate because it connotes a quantitative process whereas Aristotle has qualitative distinctions in mind. *See* J.O. Urmson, *Aristotle's Doctrine of the Mean*, *in* ESSAYS ON ARISTOTLE'S ETHICS 157-70 (Amelie O. Rorty ed., 1980).

130. Obviously, the role of the emotions in the operation of moral perception is a complicated matter. The widespread influence of Platonic and Kantian suspicion of the passions makes it seem as if desire is our enemy. People who cannot control their anger, lust, or jealousy, for example, are bound to act inappropriately. On this account, the self is divided into two selves, one that is rational (and in control) and one that is emotional (and out of control). When the rational, higher self controls the lower self, as Plato would have characterized it, the soul is in harmony. In some cases, this metaphor seems to capture moral failures in which people cannot control their appetites

Aristotle points out that the epistemological confidence that we can muster for our truth claims is relative to their subject matter. There are, of course, different relationships of support between the premises and conclusions in inductive and deductive arguments. He is also making a metaphysical point about the non-codifiable nature of human decisionmaking and the extent to which such judgments can be said to be true:

> Therefore in discussing subjects, and arguing from evidence, conditioned in this way, we must be satisfied with a broad outline of the truth; that is, in arguing about what is for the most part so from premisses which are for the most part true we must be content to draw conclusions that are similarly qualified. The same procedure, then, should be observed in receiving our several types of statement; for it is a mark of the trained mind never to expect more precision in the treatment of any subject than the nature of that subject permits; for demanding logical demonstrations from a teacher of rhetoric is clearly about as reasonable as accepting mere plausibility from a mathematician.[131]

Likewise, the truth of a moral judgment that is a product of practical reasoning depends upon the particular details of the actual context in which the agent chooses. It is a mistake to expect too much precision:

> But we must first agree that any account of conduct must be stated in outline and not in precise detail, just as we said at the beginning that accounts are to be required only in such a form as befits their subject-matter. Now questions of conduct and expedience have as little fixity about them as questions of what is healthful; and if this is true of the general rule, it is still more true that its application to particular problems admits of no precision. For they do not fall under any art or professional tradition, but the agents are compelled at every step to think out for themselves what the circumstances demand, just as happens in the arts of medicine and navigation.[132]

That matters of judgment are not "fixed," however, does not mean that the results of the exercise of such judgment are relativistic or subjective. The agent is committed to arriving at the right decision and not one that is merely pleasing.[133] Obviously, one can make bad judgments in both medicine and navigation that have serious consequences. In fact, we would consider very poor judgment to be

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for food, drink, or sex. It is as if another less disciplined self temporarily took over control of one's mind and body. What this picture overlooks, however, is that the intellect may consult the feelings for information about the true nature of the situation. In fact, a pure intellectual grasp of the moral salience of the facts, without the assistance of the emotions, may be impossible. Unlike Plato and Kant, Aristotle did not sharply distinguish the cognitive and the emotive. *See* SHERMAN, MAKING A NECESSITY OF VIRTUE, *supra* note 29, at 249-53.

131. ARISTOTLE, *supra* note 54, at 1094b 65.

132. *Id.* at 1104 all 93.

133. F.H. LOW-BEER, QUESTIONS OF JUDGMENT: DETERMINING WHAT'S RIGHT 53 (1995).

a product of recklessness or gross negligence. The point is that no two situations are exactly the same and thus, principles or rules must be modified to fit the uniqueness of the circumstances. General rules only hold "for the most part" because changes in circumstances can affect the applicability of the rule or its strength relative to other rules or considerations. The most appropriate response, then, calls for a careful examination of the particulars and an appreciation of when a general rule may or may not be applicable.

Aristotle would reject Kant's "subsumption" model of judgment as being too mechanistic. But he makes a similar point in the *Nichomachean Ethics* about the relationship between prudence (practical wisdom) and the appreciation of concrete context:

> Again, prudence is not concerned with universals only; it must also take cognizance of particulars, because it is concerned with conduct, and conduct has its sphere in particular circumstances. That is why some people who do not possess theoretical knowledge are more effective in action (especially if they are experienced) than others who do possess it.[134]

Aristotelian ethics is famous for being oriented toward choosing wisely in real circumstances and not toward theoretical systematization or modeling for its own sake.[135] A person who cannot read the relevant details of particular situations and be attuned to their significance cannot be wise. For Aristotle, the focus is always on the specifics of the case. As Nancy Sherman remarks, "[W]ise judgment hits the mean not in the sense that it always aims at moderation, but in the sense that it hits the target for *this* case. As such, description and narrative of the case are at the heart of moral judgment."[136]

In addition, Aristotle emphasizes the extent to which wise moral choice is realized in the actual actions of the practically wise person (*phronimos*). The criterion for right choice is based on what such a person would decide to do in real situations. Thus, virtue and practical wisdom are inseparable. For Aristotle, the rendering of good decisions can never be reduced to merely following rules or procedures. Indeed, an important part of the Aristotelian project is to remind us of their limits. Choice in real situations requires much more fine-grained discernment than rules or principles can ever provide.[137]

Even if Aristotle's solution to the problem of practical choice leaves us wanting more explication, his formulation of the problem is highly instructive. Such choice is about searching for partial insights that, in the end, comprise a probable interpretation of the setting of action. Recently, under the name of

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134. ARISTOTLE, *supra* note 54, at 1141b8 213.

135. SHERMAN, MAKING A NECESSITY OF VIRTUE, *supra* note 29, at 267.

136. *Id.* at 244.

137. For contemporary versions of Aristotelian particularism, see JONATHAN DANCY, MORAL REASONS (1993); John McDowell, *Virtue and Reason*, *in* ARISTOTLE'S ETHICS: CRITICAL ESSAYS 121 (Nancy Sherman ed., 1999); DAVID MCNAUGHTON, MORAL VISION: AN INTRODUCTION TO ETHICS (1988); Nussbaum, *The Discernment of Perception*, *supra* note 29, at 145-81.

"casuistry," there have been a number of attempts to rescue judgment from caricature and to rehabilitate it as a means of moral reasoning.[138] Albert R. Jonsen and Stephen Toulmin have argued on behalf of a more flexible, practical attitude toward ethics, in which judgment replaces the attempt to construct rigid rules from which practical conclusions can be deduced.[139] As Richard B. Miller remarks,

> Casuistry seeks to deliver us from those occasions when rules are unclear, when conflicting rules pull us in opposite directions, or when we must ascertain degrees of moral culpability . . . . Casuistry thus teaches that we are not sufficiently equipped when we have merely determined the rules of morality; nor is it enough simply to appeal to the strengths of moral character. Rather, our rules and our character must be put to practical use in our day-to-day lives, and casuists seek to show in concrete terms how we are to put morality into action.[140]

The challenge for anyone writing on judgment, then, is to specify what it means to put morality into action in terms that are not intolerably vague.

Neo-casuists do not put forth formal decision procedures or rigid methodologies and frankly admit that their conclusions in hard cases are subject to challenge both on theoretical and empirical grounds. This is not an admission of failure but rather reflects a realistic sense of what judgment can accomplish in terms of making moral choices easier. At the same time, a theory of judgment or casuistry should help real people to make real moral and political decisions.

Judgment is about determining whether the right issues were identified and

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138. As an ethical form of practical reasoning, casuistry is a kind of moral inquiry that focuses on concrete moral problems, their proper characterization, and their reasonable resolution. Unfortunately, casuistry lost its intellectual respectability hundreds of years ago in the wake of Pascal's *The Provincial Letters*. Not much has changed since this time. The allegation that casuistry is synonymous with chicanery, disingenuous argument, ad hoc reasoning, sophistry, evasion, and the manipulation of moral standards to rationalize unacceptable behavior still is widely believed. People are more likely to associate casuistry with President Clinton's equivocations during the impeachment proceedings, i.e., that the meaning of the word "alone" is vague, than with a bona fide attempt to apply a norm in a context-sensitive manner. Even today, few Roman Catholic theologians practice casuistry. In condemning bad casuistry, however, Pascal painted with too broad a brush, discrediting all casuistry and ignoring the important distinction between an arguable application of a principle to a hard case and its abuse (of which some of the Jesuits in *The Provincial Letters* stand guilty as charged). Pascal himself never confronted the practical problem of how to make complex moral decisions other than by appealing to Scripture. We must move beyond caricatures and take seriously the possibility that even people with the best intentions can make casuistic mistakes by failing to apply principles competently. That the Jesuits abused casuistry—or that it can be manipulated by anyone for that matter—should come as no surprise to us. But that is not a good reason to give up on the very enterprise altogether.

139. ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988).

140. MILLER, *supra* note 83, at 4.

considered, whether these issues were weighed properly and whether the final decision was reasonable in light of the known facts and the probabilities attached to the given alternatives.[141] We can spot lapses in the process when we have identified how a judgment was made and evaluate it according to the above criteria. A comprehensive or refined judgment identifies all of the considerations that should be brought to bear in making a reasonable decision. This is one of the central differences between a good judgment and a poor one. Such a judgment serves as a preliminary report on the issues that must be addressed in more detail, setting the agenda for future deliberation and reflection before a final decision is reached. While our expectations here should be modest after all, we ought to expect some degree of reasonable disagreement in hard cases—the ability to narrow the range of our descriptions of particular cases is an important step toward rational justification.

## III. THE NATURE OF GOOD JUDGING

### *A. Moral Perception*

This brings us to the "moral" part of moral judgment. At the outset, it might be easier to explain what moral judgment cannot do. An adequate account of moral judgment cannot explain evil, pathological, or immoral behavior. At the same time, it can illuminate the ways in which even sincere people can go wrong. A compassionate person who genuinely believes in principles of fairness still may be prone to honest, although not necessarily excusable, errors. A genuine commitment to tolerance or fairness will not necessarily lead to behavior that is truly tolerant or fair. After all, it is not difficult to imagine a person who has unimpeachable principles but who nonetheless does a very poor job of assessing the salient features of real situations.[142] If she cannot close the gap between the abstract moral principle and the concrete context in which she must act, she may often behave in ways that appear to be hypocritical even though her mistakes are entirely innocent.

Furthermore, mistakes of judgment do not always result from lacking complete access to empirical information or from being incapable of predicting the probable consequences of possible courses of action. Instead, they can also reflect the failure to see the morally relevant considerations or to balance them sensibly. We have a natural inclination to assume that better rules—i.e., those that are more fine-grained or more comprehensive—will make judgment easier.

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141. JONSEN & TOULMIN, *supra* note 139, at 83.

142. Following Hegel, many critics believe that Kantian ethics are excessively formal and insensitive to social context. A maxim, however, is a subjective principle of action; it should contain "the particulars of person and circumstance as the agent judges are necessary to describe and account for his proposed action." Herman, *supra* note 9, at 75. In formulating a maxim that will be tested for permissibility by the Categorical Imperative (CI), an agent can be attentive to the concrete details of the actual circumstances that she encounters. Otherwise, the CI cannot be an effective practical principle of moral judgment.

Yet as Kant pointed out long ago, a rule cannot contain additional rules for its application in all of the situations in which it is possibly applicable.[143] At some point, rules run out. Indeed, the need for judgment arises in the first place because of doubt about how principles should be interpreted and applied.[144]

Moral perception is the first step in making a moral judgment.[145] The agent must render the situation of choice morally intelligible by incorporating all of the morally salient details and figuring out their possible implications.[146] The notion of salience admits of degrees.[147] A person who is generally morally perceptive is more likely to put together a more comprehensive picture of the circumstances in that none of the important details are overlooked. This does not mean that either a person is or is not morally perceptive even though most likely there will be people at both ends of the spectrum. Although some people are bound to be more perceptive than others inasmuch as they see the world in finer moral detail, some of them will be better in some situations than in others.[148] It is not hard to imagine, for example, a person who acts callously toward her colleagues or students yet at the same time is exceptionally sensitive to the needs of her family and close friends. A person might be very attentive to the racial subtext of a particular social situation yet not appreciate its other moral aspects.

Being perceptive in this way depends on a kind of empathetic understanding that enables the agent to see what she needs to see to react appropriately.[149] A

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143. Kant, *supra* note 118, at 61.

144. MILLER, *supra* note 83, at 18.

145. As Seyla Benhabib writes,

> How does an agent recognize this particular situation as being one that calls for the duty of generosity? Suppose through some circumstances, the details of which are not exactly clear, a friend in the publishing business manages to squander the family fortune and is heavily in debt. We must first determine whether these particular circumstances are ones in which such a duty of generosity has a claim on what we are to do. But how do we determine the claims of the circumstances upon us? Note that this question does not concern the moral duty an agent acknowledges to be generous. It concerns the interpretation of the duty of generosity in this particular case.

Seyla Benhabib, *Judgment and the Moral Foundations of Politics in Arendt's Thought*, 16 POL. THEORY 29, 34 (1988).

146. *Cf.* PATRICIA M. KING & KAREN STROHM KITCHENER, DEVELOPING REFLECTIVE JUDGMENT: UNDERSTANDING AND PROMOTING INTELLECTUAL GROWTH AND CRITICAL THINKING IN ADOLESCENTS AND ADULTS 7-8 (1994).

147. *See* BLUM, *supra* note 19, at 32.

148. As E.D. Hirsch observes, "A lawyer usually interprets the law better than a literary critic not because he applies special canons of statutory construction but because he possesses a wider range of immediately relevant knowledge." HIRSCH, *supra* note 93, at vii.

149. As Thomas Hill remarks,

> I suspect that without compassion one can never really become aware of the morally relevant facts in the situation one faces. The inner needs and feelings of others are virtually always relevant, and without compassion one can perhaps never fully know what these are—or give them their appropriate weight.

person who is morally perceptive should also have enough imagination to see new implications of old principles.[150] When emotions have been cultivated properly, they can sharpen our moral vision by attuning us to morally significant features of real situations that otherwise we might miss.[151] Truly compassionate people see the world in finer moral detail than other people do because they are more emotionally acclimated to subtle signs that indicate deeper meanings. On this view, kindness or compassion is not simply a behavioral predisposition or a raw emotional state. Rather, it is a kind of perceptual attentiveness that attunes one to the considerations that must be reflected upon before a good decision can be made. A compassionate person can recognize the discomfort or distress of others because she can see less obvious indications that others usually miss. The danger of self-absorption is that it blinds us to the needs of other human beings by preventing us from seeing these people as they really are.[152]

If we can avoid representing people to ourselves in ways that are self-serving, then we can begin to see accurately. A morally perceptive person does not let her biases nor her desires keep her from seeing the world from a number of different perspectives that do justice to its complexity. This standpoint requires the agent to avoid seeing everything through the optic of her own ego. This does not mean that the degree of identification that is desirable requires some kind of Platonic seeing without illusion or Buddha-like vision, but rather involves accepting the separate reality of other people and trying to understand them as they understand themselves.

### *B. The Relevance of Aristotelian Judgment to Principle-Based Ethical Theories*

Presumably, for Aristotle, the practically wise person is morally perceptive. She can see patterns or the relevant similarities and differences in other cases, just as a good judge can select the right precedents to justify a legal decision. Such a person is particularly adept at making the subtle distinctions that capture all of the relevant details. A principle or rule of thumb may cover a number, or even a wide range of different cases, predisposing but not making the agent act in a certain way. The practically wise person realizes that such principles only hold for the most part. Indeed, the main task of human choice is to determine

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THOMAS E. HILL, JR., AUTONOMY AND SELF-RESPECT 51 (1991).

150. For example, early on, Justice John Marshall Harlan anticipated that free speech might also include symbolic expression. Garner v. Louisiana, 368 U.S. 157 (1961) (sit-ins at privately-owned, racially segregated, lunch counters).

151. Empirical research on affect and social judgment shows that "emotional feelings influence which facts decision makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them." NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 77 (2000).

152. For example, for Iris Murdoch, the central moral imperative was "unselfing," that is, "the overcoming of the self-centeredness that prevents us from loving others as separate existences." DAVID J. GORDON, IRIS MURDOCH'S FABLES OF UNSELFING 7 (1995).

when such principles hold and when they do not hold, or how they should be qualified in light of the circumstances. The application of ethical maxims to real circumstances, then, requires the assistance of the faculty of judgment that enables an agent to make an appropriate decision in her particular circumstances. This is an important point because the problem is that the real difficulty of choosing wisely lies in the indefinite nature of the conditions of choice. For this reason, any general principle which might be thought to govern the situation and produce a conclusion deductively cannot identify the exceptions or trade-offs that might lead to a better choice, all things considered.

To convince a Kantian of the centrality of judgment, we only need to point out that the value of Aristotelian sensitivity to context extends to the cognitive process of applying abstract principles of right.[153] The rehabilitation of contextualism in Aristotelian ethics against the formalism in Kantian ethics dissolves the rigid contrast between the two ethical traditions in a way that brings out the strengths of each. As Lawrence Blum points out, principle-based theories of morality require moral perception.[154] A person must be aware not only of the brute facts of a situation but also be able to appreciate their relationship to her deeper moral convictions.[155] Similarly, if a citizen has no preconception of the value of freedom and equality, she will not know what features of the moral terrain of political life should catch her attention to trigger a proper response. One can be aware of the existence of a raw fact yet be unaware of its deeper moral meaning. When exercised competently, the faculty of judgment connects that fact(s) to the relevant moral principle(s) and makes sound moral judgment possible.[156]

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153. For example, Joshua Cohen concedes that "which considerations count as reasons" depends on context. Joshua Cohen, *Democracy and Liberty*, *in* DELIBERATIVE DEMOCRACY 194 (Jon Elster ed., 1998). Among contemporary commentators, Charles Larmore is somewhat unique in that he openly recognizes the importance of moral judgment in applying general rules to particular situations. He points out that higher level principles—such as utilitarianism or Kantian universalizability—can exclude or give insufficient weight to other moral considerations. Larmore's qualified moral particularism takes seriously the need to respond to the particularity of a situation by going beyond the form of general rules. Yet he seems to be too eager to conclude that such judgment resists theoretical understanding and too willing to insist that judgment should play a greater role in personal rather than in political morality. As such, his account of moral judgment overlooks the extent to which such judgment is relevant to the practice of citizenship in a deliberative democracy in which the public deliberation of citizens legitimates collective decisions. *See* LARMORE, *supra* note 29, at ix, 7, 20-21.

154. BLUM, *supra* note 19, at 31.

155. I borrow this distinction from Lawrence Blum, *Moral Perception and Particularity*, 101 ETHICS 701-25 (1991).

156. As Carl Jung puts it,

> Consciousness is something like perception, and just as the latter is subjected to conditions and limits, so is consciousness. For instance, one can be conscious at various stages, in a narrower or wider sphere, more superficially or more deeply. These differences of degree are, however, often differences in character, in that they depend

### *C. The Limits of Principles*

One can be sincerely committed to opposing racism, for instance, yet be a poor judge of what this moral commitment requires in real situations. Consider the following example. Some African-American jurists believe that white judges are much less sensitive than African-Americans are to manifestations of racism in their courtrooms.[157] One possible explanation for this alleged comparative lack of sensitivity is that white judges are less likely to see the racist overtones of behavior on the part of attorneys, witnesses, and other court officers because they are racist. They believe in racial superiority, have internalized racial stereotypes, or are not sufficiently aware of their own racial biases. These explanations, of course, may be true. On the other hand, a person can also be sincerely committed to eradicating racial discrimination yet at the same time miss real instances of racism. Such instances may not register because she lacks the kind of perceptual sensitivity that Aristotle associates with *phronesis*. This failure, while perhaps blameworthy, is not tantamount to being racist in the sense of harboring malice toward particular racial groups. Instead, it exhibits a kind of blindness on the part of the human agent who is situated in particular circumstances but cannot see what she should be able to see. Not acting appropriately, then, is not always a product of having the wrong intentions or motives.[158] An agent who is conscientiously devoted to the right principles may not respond to a real moral problem appropriately because of her failure to appreciate its morally salient features or her refusal to acknowledge the significance of competing concerns.[159]

The moral response that ultimately emerges is a product of a dialectical process in which she has described, redescribed, evaluated, and reevaluated how

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> completely upon the development of the personality—that is to say, upon the nature of the perceiving subject.

Carl Jung, *Foreword*, DAISETCH TEITARO SUZUKI, AN INTRODUCTION TO ZEN BUDDHISM 18 (1964).

157. *See, e.g.*, LINN WASHINGTON, BLACK JUDGES ON JUSTICE: PERSPECTIVES FROM THE BENCH (1994). Although the political ideologies of African-American judges that were interviewed for this book ranged from the right to the far left, nearly all of them commented that the experience of being African-American in America sensitized them to the subtle forms that racism takes in institutional contexts.

158. For Aristotle, a human being that was perceptively challenged would lack virtue and thus, would not have good character. It is not clear, however, whether that person could be said to be responsible for his or her character, that is, not being able to see what a normal person should see.

159. Justice Hugo Black was notorious for reading the free speech clause of the First Amendment literally. By contrast, Justice John Marshall Harlan "viewed balancing not as an escape from judicial responsibility, but as a mandate to perceive every free speech interest in a situation and to scrutinize every justification for a restriction of individual liberty." Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001, 1013-14 (1972).

the applicable abstract principles and facts fit together.[160] Knowledge of what action a moral principle may require in those particular circumstances is as much a part of choosing well and acting appropriately as having the right principles or the right motives. Indeed, it is far from obvious that one can be said to have a particular virtue, such as compassion or generosity, when that person typically cannot figure out the proper response in the real world. Being compassionate toward the wrong people, for example, can be a vice. The attentiveness that underlies moral perception is a moral quality that judges ought to possess when they adjudicate hard cases of constitutional law that divide the electorate.[161] The point is not that either the judge sees the case in the right light or she overlooks all of the relevant features. Rather, the comprehensiveness of her response lies along a continuum and judges can do better or worse jobs at describing real constitutional questions in terms of including all of the relevant considerations.

### *D. Examples*

The failure to appreciate moral salience is the failure to see what a normal person should have seen.[162] Take the following couple of examples. In *Toward Neutral Principles of Constitutional Law*, Herbert Wechsler criticized *Brown v. Board of Education*[163] on the grounds that its justification was not "neutral."[164] Wechsler believed that the legal issue boiled down to two types of associational preferences: the preferences of African-Americans to attend integrated public schools and the preferences of whites to attend segregated public schools.[165] For him, the Court had not advanced a neutral principle to justify the decision to favor the preferences of African-Americans and therefore, the decision itself was constitutionally suspect.[166] This criticism rests on the assumption that the associational preferences of each racial group are somehow comparable, an assumption that neglects the historical context of racial inequality and its social, political, and economic implications. In *Brown*, the Court was not just taking sides in a partisan debate over the wisdom of racial integration in public schools. Rather, the conflicting preferences were not treated as moral equivalents because

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160. *Cf.* Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 262 (1979).

161. John McDowell identifies this kind of sensitivity or perception with virtue. McDowell, *supra* note 137, at 122-24.

162. The extent to which an agent is morally responsible for her failure to see what she should have seen is, of course, a difficult question. On the one hand, we do not expect ordinary people to have the practical wisdom of the Aristotelian *phronimos*. On the other hand, in our civil law system of torts, we hold people to the legal standard of negligence (the failure to exercise the due care that a reasonable person should have exercised) and assign civil liability to them when their conduct falls short of this standard.

163. 347 U.S. 483 (1954).

164. Wechsler, *supra* note 14, at 1.

165. *Id.* at 34.

166. *Id.*

what was at stake was equal citizenship in America. It takes little imagination to appreciate the extent to which government-sanctioned segregation of public facilities, the enforcement of racially restrictive covenants, and exclusionary residential zoning may have created a group of second-class citizens. Wechsler's challenge to the legitimacy of *Brown* fails because he could not see what was obvious to many other people: that racially segregated public education has widespread inegalitarian ramifications and thus, a preference for such segregation is simply not on par with a preference for integration.

In *Bowers v. Hardwick*,[167] Michael Hardwick challenged a Georgia statute that prohibited consensual sodomy on the grounds that he had a fundamental constitutional right to engage in such conduct. In a 5-4 decision, the United States Supreme Court upheld the Georgia statute. The majority concluded that, unlike the rights of married people or unmarried heterosexuals to sexual autonomy, the Constitution does not protect such rights for gay persons.[168] In the majority opinion, Justice White characterizes the legal issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[169] He then immediately distinguishes the case from past privacy cases dealing with family, marriage, and procreation and announces that the Court will not establish a new constitutional right that would protect sodomy between consenting adults.[170] Last, he distinguishes *Bowers* from *Stanley v. Georgia*,[171] which protects the right to possess and read obscene material in the privacy of one's own home, claiming that the latter decision was rooted in the First Amendment.[172]

What is remarkable about this opinion, apart from its appeal to prejudice against homosexuals and its uncritical celebration of religious tradition, is the extremely narrow way in which White frames the legal issue. His description of the case does not come close to capturing all of the relevant considerations. This failure is not simply a matter of defining an alleged constitutional right narrowly or broadly, that is, in terms of a right to a gay or lesbian sex act or a right to sexual intimacy for all adults.[173] Like the dissenting opinion,[174] one could argue

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167. Bowers v. Hardwick, 478 U.S. 186 (1986).

168. Initially, Powell had thought that a twenty-year prison sentence for consensual sodomy was "cruel and unusual punishment" and thus, the case could be decided on Eighth Amendment grounds alone. Later, he changed his vote and sided with the majority to uphold the Georgia statute. After his retirement, he remarked that "I probably made a mistake in that one [*Bowers*]." He also told a reporter that "I do think that it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinion a few months later, I thought the dissent had the better of the arguments." JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 520, 530 (1994).

169. *Bowers*, 478 U.S. at 190.

170. *Id.* at 190-91.

171. Stanley v. Georgia, 394 U.S. 557 (1969).

172. *Bowers*, 478 U.S. at 194.

173. From the existence of this problem more generally, Mark Tushnet concludes that these levels of abstraction are easily manipulated and as such, do not adequately constrain judicial

that this case is really about "the right to be left alone" and as such, is consistent with other privacy cases like *Griswold v. Connecticut*,[175] *Eisenstadt v. Baird*,[176] *Carey v. Population Services International*,[177] and *Roe v. Wade*.[178]

The problem is that the majority opinion focuses only on the physical aspect of the conduct in question. By upholding the statute against constitutional challenge, the Court permitted states to criminalize the sexual dimension of non-heterosexual romantic relationships, including those in which the two people love each other. Until recently, this decision allowed a state that was so inclined to prosecute gay people who are not celibate and to imprison them, even those who would marry if that option were available to them.[179] In effect, the decision meant that in states that had prohibited homosexual sodomy, a gay couple had to remain celibate to comply with the law. Yet the majority opinion never explained, or for that matter even addressed, why a homosexual relationship is a potentially less meaningful moral encounter than a heterosexual relationship.

Obviously, one cannot assume without argument that homosexuals are less likely to reach out to each other in a loving relationship than heterosexuals are. Nor did the majority opinion explain why gay and lesbian couples should be treated differently than heterosexual couples and denied certain inheritance rights, the ability to sue for wrongful death, the right to file a joint income tax return, hospital visitation rights, alimony, child support, and the right to make health care decisions for an incapacitated partner. The point is not that these considerations necessarily would have been conclusive. Rather, at the very least, this way of characterizing what was also at stake in *Bowers v. Hardwick*—the right of a loving couple to enjoy sexual intimacy as an expression of their love for each other—should have been addressed by the majority opinion.[180] Even Blackmun's dissent misses this point because he defines the right at stake as one of sexual privacy, whereas the Georgia statute extends far beyond casual sexual encounters.

The purpose of these brief remarks is to make plain that plausible arguments along these lines could have been developed, yet the majority decision conspicuously failed to address them. As Mary Ann Glendon has noticed, the

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discretion. TUSHNET, *supra* note 52, at 135.

174. *Bowers*, 478 U.S. at 199-200 (Blackmun J., dissenting).

175. 381 U.S. 479 (1965).

176. 405 U.S. 438 (1972).

177. 431 U.S. 678 (1977).

178. 410 U.S. 113 (1973).

179. Lawrence v. Texas, 123 S. Ct. 2472 (2003).

180. The Author realizes that not all such homosexual sexual encounters take place within the context as a loving, long-term relationship. Yet the point is that the Georgia statute covered such relationships as well. By ignoring this possibility, the majority was able to turn the issue into a right to a sex act divorced from its possible deeper moral context. Indeed, it is quite a tragedy that the United States Supreme Court could have rendered such a thoughtless decision without more sensitivity to its consequences for those who were involved in long-term monogamous relationships.

decision in *Bowers* lacks "depth and seriousness of the analysis contained in its majority and dissenting opinions" compared with some of the discussions that have taken place abroad.[181] Alternatively, those who make thoughtful decisions are likely to mull over all of the relevant considerations in light of social reality and put together a rich picture of the case at hand. These kinds of decisions can be difficult because one may neglect a relevant fact and thus, not respond appropriately. Or one may simply not be aware of the deeper meaning of the facts.[182] The true nature of such situations may even be hidden from people with the best character—i.e., those who genuinely care about other human beings and seek to treat everyone fairly.

One of the great tragedies in human life is that those with the best of intentions can so easily go wrong. Whether a person will respond appropriately to real moral situations turns on the extent to which she identifies the morally salient features of her situations of choice. The best choice under difficult circumstances will always incorporate the most significant considerations that count for or against a particular course of action because reasons for action are always context-dependent. Such reasons must be particular in character and be assessed relative to the other particulars. As in the two examples above, a decision that leaves out too many of the relevant details will result in moral failure.

### *E. Weighing Competing Considerations*

Facts and reasons exist even when the agent does not recognize their existence.[183] The operation of moral perception and moral judgment, combined with deliberation with others, enables the agent to render a more complete description of the circumstances of choice and yields provisional reasons about what to do. She then must sort through all of the remaining reasons before deciding how to act. Considerable room exists, then, for deliberation and correction of initial impressions because all of the relevant considerations are only potential reasons or candidates for action. From the standpoint of the judge who must make a decision at some point, their significance only becomes apparent when they are somehow connected to the relevant legal authorities. When a particular fact in a given case implicates political equality, for example, then we have a reason, which must be weighed and balanced against other reasons, in deciding upon the most appropriate course of action.[184]

This is the kind of legal reasoning that the practice of constitutional adjudication requires. The central task of the individual appellate judge is to

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181. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 151 (1991).

182. For instance, in *Bowers v. Hardwick*, Justice Powell had great difficulty in acknowledging the existence of homosexuality in America. JEFFRIES, *supra* note 168, at 528.

183. *See* Joseph Raz, *Introduction*, *in* PRACTICAL REASONING 3 (Joseph Raz ed., 1978).

184. In applied ethics, the "stringency" of a moral rule refers to its weight relative to other considerations. Russ Shafer-Landau, *Moral Rules*, 107 ETHICS 584, 585 (1997).

determine the strength of these reasons, all things considered. After all, merely bringing a fact or its significance in terms of the governing legal standards to another judge's attention does not create a conclusive reason for a vote. It merely makes her aware of its existence or possible relevance and makes it possible for that person to take it into account in making a good decision. The facts of a particular case become conclusive reasons for an action only when they bear a clear relationship to the relevant legal norms and defeat other conflicting or competing reasons.

Weighing reasons is a metaphor. The thought is that each set of reasons is placed on a balance scale and those that are heaviest outweigh the reasons that support the opposite conclusion. We should not take this metaphor too literally or assume that this process can be quantitative. After deliberation with the lawyers, their clerks, and their colleagues but before they must vote, a judge finds herself in the position of determining the strength of all of the relevant reasons relative to one another for or against a particular decision. These reasons are only *prima facie* reasons.[185] Another reason may defeat a *prima facie* reason in the sense that it has greater weight or force, in this particular situation, all things considered. For instance, generally, a judge is expected to support a right to free speech or free association. However, in the case of anti-gang injunctions, that same judge might assign a greater value to the protecting the community from gang activity and therefore, support such injunctions. No mathematical value can be assigned to these competing considerations. The weight that each of them should be assigned becomes a matter of offering the best possible reasons and evidence for one position on the issue and then assessing the strength of the counterarguments.

In constitutional adjudication, this means that prima facie reasons can be overridden by stronger reasons. Whether they yield a particular conclusion on how to resolve a particular fundamental question of constitutional law is to be determined through the best efforts of judges at making a rational comparison among the arguments that compete for their allegiance. At the moment of choice, they must make up their own minds in selecting the argument that strikes them as most compelling. In a given case, there is likely to be a continuum of *prima facie* reasons, ranging from the very strong to the very weak. Aristotle's notion of the practical syllogism, where a true minor premise coupled with a true major premise yields a correct practical conclusion, is of little help in hard cases because there are liable to be a number of potentially appropriate minor premises that seem to describe the concrete facts of the case equally well.[186] After all, a

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185. W.D. Ross first introduced the distinction between *prima facie* duties and other kinds of duties in W.D. ROSS, THE RIGHT AND THE GOOD (1930).

186. Legal or moral norms could be thought to serve as the major premise in a practical syllogism. The practical conclusion that this reasoning produces is then exhibited by how the agent acts (assuming no weakness of the will, wickedness, or other behavioral incapacity on her part). Let us assume that a person is committed to an abstract principle of racial equality and conscientiously attempts to avoid racist behavior at all times. The major premise in all of her practical reasoning will be something like "treat all persons equally regardless of race" or "be on

hard case is hard precisely because it can be described plausibly in different ways that imply opposing conclusions. The very notion of a *prima facie* reason is premised on the assumption that in some cases, agents only appear to have certain reasons to act in a particular way and that these reasons can be trumped by other reasons when all of them have been properly considered. The initial reason(s) counts for something but it can be outweighed, upon reflection, by stronger reasons. As such, the strength of a reason in a particular case cannot be determined *a priori.*

### *F. Resolving Conflicts of Norms*

When two legal principles or their underlying values conflict, judges must be able to balance them, as fairly possible, after reviewing all of the relevant considerations. Whereas advocates present their case in an intentionally one-sided manner, a judge must render a legal judgment that does justice to both sides of the case. Her decision must be covered by the applicable legal rules and be consistent with how past cases have interpreted those rules. As such, unlike an advocate, a judge must be able to assume a much broader perspective. The harder the case, however, the more likely the judge will find herself in a situation where she must choose between two sets of reasons, both of which appear to be equally compelling.

How does she rationally resolve such a conflict? A dilemma or conflict of norms exists when at least two norms, which are applied independently, lead to opposite conclusions. This possibility is probably the exception and not the rule yet the existence of hard cases means that we must have a rough outline of an approach that is designed to produce choices that do not demand existential leaps of faith. That one reason has priority over another reason under certain circumstances does not mean that it necessarily would have priority under different circumstances. One is not inconsistent by allowing particular reasons to trump other ones on a more or less ad hoc basis when the contexts differ.

The problem with grand theories of constitutional interpretation, which purport to be internally coherent, is precisely that they try to fit all cases into the same mold and thus, are too insensitive to the concrete details. A judge can only be accused of inconsistency when she votes differently in two cases that are truly alike. Their relevant similarities or dissimilarities cannot be decided by the theory in advance, but rather boil down to a careful assessment of the particulars. Indeed, a large part of public deliberation ought to be devoted to investigating whether cases that seem to be hard and are open to dispute resemble easier cases

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guard against acting on the basis of racial stereotypes." A person who is deeply racist, of course, will not even begin with this major premise. Her moral failing, in other words, is better explained by her not having the right principle in the first place. This principle can be more or less specific but what is important is that it gives some very general guidance about what he or she should be looking for. The principle itself can never be sufficiently detailed to enable her to deduce a practical conclusion from the major premise itself. In fact, it may not be obvious that a particular situation is covered by the general principle at all.

that have yielded defensible answers in the past. As such, it should be possible to draw the conclusion that is supported by the strongest set of reasons even in the midst of reasonable disagreement. If we have strong reasons that lead to a particular conclusion, and only relatively strong reasons that oppose it, then the reasons for outweigh the reasons against.

Alternatively, if there are only reasons against, then those reasons support the opposite conclusion. When a judge confronts two considerations that seem to have equal weight, she also must ask herself what the point of the law is. That is, what is its relationship to the proper functioning of a constitutional democracy? What democratic or liberal values is it designed to serve? In many cases, the answer will be that constitutional provisions stand for the value of equal concern and respect for all citizens. That is not a decision procedure, to be sure, but it should help the conscientious judge to focus her inquiry on the facts and considerations that advance or inhibit political and legal equality.

Those who are ideologically fanatic will not welcome this approach to resolving the most important questions of constitutional law because they will insist that the moral rightness of their views is the only consideration that should matter when collective decisions have to be made. Because their higher-level abstract theories are right and those of others are wrong, they believe that they are justified in not reaching agreement with anyone else. Still, that any single political philosophy could ever do justice to the ethical complexity of political life is extremely improbable. Excessive partisanship is not the right way to think about public justification in politics. Equally importantly, it is not the right way to think about the complexity of real problems of constitutional law and the inherent difficulty of striking the right balance among competing considerations that judges must confront in their institutional role as moral experts in a democracy.

## CONCLUSION

As Oliver Wendell Holmes once wrote, "General propositions do not decide concrete cases."[187] In hard cases of constitutional law, where a judge must close the gap between highly abstract constitutional language and the particulars of the case, moral choices are unavoidable. To render a good decision is to discern the morally salient facts, to connect them to the relevant legal norms, to predict probable consequences, and to weigh competing considerations appropriately. The kinds of people that we want to sit on the federal bench when important questions of social morality are at stake are the kinds of people who can exercise moral judgment in this manner. Even more ambitiously, we hope that they will also be able to recognize and evaluate new moral phenomena, thereby sharpening our understanding of the moral ramifications of our constitutional values.

As this Article has tried to establish, much of the hard work in resolving a hard case takes place closer to the ground. There are very few higher-level principles, if any, which are free of exceptions or qualifications when they are

187. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

applied in the real world. Real people, not theories, must move from abstract constitutional provisions to the particulars of the case at hand. Those who adhere to theories of original intent or original understanding severely underestimate the extent to which moral choice is invariably involved in most hard cases of constitutional law.[188] One of the implications of this Article is that all higher-level theories of constitutional interpretation are limited in terms of their abilities to resolve real cases.[189] In making legal decisions, judges must recognize these limitations and be prepared to draw upon non-legal sources.[190]

The point is not that liberal judges are necessarily better than conservative judges at exercising moral judgment. Moderate judges who are not in the thrall of a particular ideology are probably more likely to appreciate the nuances of real cases and to balance competing considerations appropriately. After all, we want people who are fair to sit on the bench. At the same time, a judge who has experienced racism, sexism, and poverty is more likely to be sensitive to such considerations. In other words, to have good moral judgment is also not to be ignorant of the diverse moral aspects of social reality. As such, life experience may be relevant in determining the proper qualifications of a judge. The notorious difficulty of translating theory into practice boils down to the extent to which judges can exercise moral judgment competently in the sense of avoiding egregious errors. That constitutional provisions can be ambiguous or have disputed applications is a fact that we will have to live with. Some cases will always be hard in that they will have complicated facts, present new issues, have uncertain consequences, or contain competing considerations that are difficult, if not impossible, to balance.

The strength of specific reasons is contingent on the concrete context of the hard case to be resolved. At times, context-dependent reasons can be weighed differently and reasonable people may reach different, yet equally legitimate, conclusions. Strictly speaking, such reasons do not "prove" a specific legal conclusion. Rather, they support it in the sense that there can be better or worse reasons even when the criteria for distinguishing better from worse can be challenged. The absence of an Archimedean standpoint that transcends all historical and social settings is not the epistemic disaster that skeptics would have us believe. As Richard Bernstein puts it, "We must avoid the fallacy of thinking that since there are no fixed, determinate rules for distinguishing better from worse interpretations, there is consequently no rational way of making and warranting such practical comparative judgments."[191] Argumentation is still

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188. *See* Ronald Dworkin, *Bork's Jurisprudence*, 57 U. CHI. L. REV. 657, 677 (1990) (book review).

189. *Cf.* Michael D. Bayles, *Moral Theory and Application*, 10 SOC. THEORY & PRACTICE 97, 99 (1984) ("At best, moral theory provides suggestions to be used in analyzing particular problems by indicating past thinking on concrete problems, the meaning of principles, and considerations to be taken into account.").

190. GREENAWALT, *supra* note 44, at 215-16.

191. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERENEUTICS, AND PRAXIS 91 (1983).

possible provided that there is a minimal consensus on what counts as a reason in support of, or against, a particular conclusion.

To the extent that we share the same legal culture and the same basic constitutional values, we have a common normative language that makes meaningful legal deliberation theoretically possible.[192] We must think very seriously, then, about the role of a "good reasons" approach in justifying legal decisions in hard cases of constitutional law. Furthermore, we must try to understand why some reasons strike us as being stronger in the sense that they are more likely to appeal to the members of our legal community. The force of the better argument is bound to depend on the extent to which lawyers and judges could potentially agree on actual cases.[193] For the purposes of constitutional adjudication, this may mean either that such agreement constitutes legal truth or that such agreement is best evidence of a legal truth that exists independently of our beliefs about it.

Any serious theory of adjudication requires a thorough account of moral judgment that goes beyond appeals to ideology and grand theories of constitutional interpretation. Such appeals obscure the multitude of choices that any judge must make in the course of deciding a hard case. This Article has tried to show that it is possible for a judge to make these choices in a non-arbitrary way and that the conceptual boundary between interpretation and invention is not as troubling as skeptics have insisted. At the same time, no appeal to abstract theories of constitutional interpretation will relieve a judge of the professional responsibility of paying careful attention to particular details. Nor will such appeals relieve us, as members of a democratic society, of finding judges who can exercise moral judgment competently.

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192. Whether our legal institutions foster such deliberation, of course, is an empirical question.

193. GREENAWALT, *supra* note 44, at 6 (arguing that there is rough agreement on the force of legal arguments).

# Indiana Law Review

**Volume 37** **2004** **Number 2**

# ESSAY

## VALUING INTEREST: NET HARM AND FAIR MARKET VALUE IN *BROWN V. LEGAL FOUNDATION OF WASHINGTON*

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ABSTRACT

Courts have long held that takings are to be valued by the fair market value of the property taken. While this standard is easy to articulate, its application in specific cases is often less straightforward leading courts, on occasion, to adopt new compensation rules to supplement or replace fair market value. The Supreme Court's recent opinion, *Brown v. Legal Foundation of Washington,* is just such a case. In *Brown*, the Court preserved the State of Washington's IOLTA program by holding that takings are to be valued by the property owner's net harm. Applied literally in future cases, the Court's net harm rule threatens to create even greater inconsistency within already convoluted takings law. This Essay argues instead that the Court's net harm rule should be read as a species of fair market value. Properly understood, *Brown's* holding is consistent with numerous valuation cases, an insight that demonstrates the breadth of the fair market value standard.

### INTRODUCTION

Just compensation for a governmental taking of private property is measured by the fair market value of the property taken.[1] While this standard is easy enough to articulate, its application in specific cases is often less straightforward leading courts, on occasion, to adopt new compensation rules supplementing or replacing fair market value. Because the relationship between the Takings Clause

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1. *E.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 25 (1984); Ala. Power Co. v. FCC, 311 F.3d 1357, 1368 (11th Cir. 2002); Palm Beach Isle Assocs. v. United States, 231 F.3d 1354, 1363 (Fed. Cir. 2000). This rule is subject to two narrow and seldom-applied exceptions. Fair market value does not apply where it would be too difficult to measure, or where manifest injustice would result. *E.g.*, Kirby Forest Indus. v. United States, 467 U.S. 1, 10 n.14 (citing United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950)).

and valuing just compensation is not well understood, a new compensation rule can create inconsistencies within current takings doctrine and interfere with efforts to bring coherence to this area of law.[2] The Supreme Court's most recent takings decision, *Brown v. Legal Foundation of Washington*,[3] threatens these very results by minting a new compensation rule that takings are to be measured by property owners' net harm. Applied as a new rule, "net harm" is inconsistent with other cases and may create unintended effects in the future. This Essay, therefore, offers an alternative interpretation, suggesting that net harm, as applied in *Brown*, is little more than a fact-specific application of fair market value.

At the most basic level, the fair market value of any property is the price a willing buyer would pay to a willing seller in a hypothetical transaction.[4] Appraisers can generally arrive at consistent fair market value determinations for many types of property, including private homes, small-scale commercial properties, and goods with a ready market for trading.[5] Whatever differences may exist between appraisals can be resolved through the normal course of litigation. Courts and legal scholars therefore usually write as though the fair market value of a particular property can be determined with a reasonable degree of precision through the mechanical application of fixed rules.

Outside these paradigmatic cases, however, contingent decisions about what to include in the valuation analysis dramatically affect a given property's fair market value. This is particularly true of takings where the property confiscated by the government is often real property without a ready market, or abstract property, like development rights, or the right to lease or use property in a specific way. The fair market value of undeveloped land, for example, includes judgments about the highest and best possible use for the property, the likelihood of a proposed commercial venture's success, the impact of permissible regulations, the chance of obtaining funding, the anticipated development costs, and the market conditions at the time of the governmental action. Divisive issues may include whether to value the property by its pre- or post-regulation value,

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2. *Cf.* Almoto Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 486 (1973) (Rehnquist, J., dissenting) (criticizing majority for "cutting loose the notion of 'just compensation' from the notion of 'private property' that has developed under the Fifth Amendment").

3. 123 S. Ct. 1406 (2003).

4. *E.g.*, United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("[T]he owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking . . . . [though] such an award does not necessarily compensate for all values an owner may derive from his property.").

5. Appraisers employ a number of different techniques to arrive at the theoretical transaction price. Where the property itself—or comparable property—has recently been sold, that actual sale price is usually strong evidence of the present fair market value. If comparable sales cannot be found, appraisers can use any of a number of substitute methods, including a discounted cash flow or cost analysis. *See* RICHARD B. PEISER, PROFESSIONAL REAL ESTATE DEVELOPMENT 69 (2d ed. 2003); *cf. also* Thomas Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 117 (2002) (identifying alternative means of assessing fair market value).

whether to offset the value of the property taken by any increase in value of the owner's remaining property, and many other determinations that arise naturally from the facts of a particular case. Ultimately at stake in these kinds of fundamental valuation decisions is the extent of protection provided by the Takings Clause.

There is, unfortunately, little agreement about how much the Constitution should protect private property because the Takings Clause's central normative goals are deeply contested. Leading economic accounts claim the Takings Clause should be interpreted to prevent fiscal illusion, forcing the government to internalize the costs of its actions.[6] Others, however, focus on the incentive effects on property owners or view takings as a form of public insurance against government actions.[7] Still others argue for interpretations of the Takings Clause that protect deeply personal property[8] or that advance progressive goals,[9] while still others view takings as a political battleground influencing the government's appetite to impose legislated instead of free-market solutions to myriad problems.[10] In the traditional takings debate, advocates of these various perspectives argue about when the government must compensate property owners. These disagreements, however, affect more than just when compensation is due but also how much the government must pay. It is therefore not surprising that compensation inquiries suffer from a similar coherence deficit. *Brown* is no

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6. *See, e.g.*, WILLIAM FISCHEL, REGULATORY TAKINGS 141-83 (1995); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 290 (2001); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 527-36 (1986); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1172-84 (1967). There is some evidence that concerns of economic efficiency were part of the original justification for the Takings Clause. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 853 n.91 (1989) ("Madison's inclusion of the just compensation clause in the Bill of Rights may also reflect concerns of economic efficiency. Madison viewed protection of property rights as essential to productive investment.").

7. *E.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569 (1984); *see also* Steve P. Calandrillo, *Eminent Domain Economics: Should "Just Compensation" Be Abolished, and Would "Takings Insurance" Work Instead?*, 64 OHIO ST. L.J. 451 (2003); Eric Kades, *Avoiding Takings "Accidents": A Tort Perspective on Takings Law*, 28 U. RICH. L. REV. 1235 (1994). In response to this tension between regulatory and investment incentives, Heller & Krier have proposed their innovative takings regime. *See generally* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997 (1999).

8. *E.g.*, MARGARET JANE RADIN, REINTERPRETING PROPERTY 146-66 (1993); Radhika Rao, *Property, Privacy and the Human Body*, 80 B.U. L. REV. 359, 387-90 (2000); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982).

9. *E.g.*, Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 767-92 (1999).

10. *E.g.*, Robert Jerome Glennon, *Taxation and Equal Protection*, 58 GEO. WASH. L. REV. 261, 276 n.81 (1990).

exception.

Under the State of Washington's Interest on Lawyer Trust Account ("IOLTA") program, at issue in *Brown,* attorneys are required to deposit client funds in interest-bearing accounts with the interest payable to organizations providing legal services to the poor. Petitioners filed suit claiming Washington's IOLTA program took their property, some $4.96—truly, four dollars and ninety-six cents—without providing just compensation as required by the Takings Clause. The Supreme Court disagreed and held that, while a taking had occurred, just compensation amounted to zero.[11] In so holding, the Court saved states' preferred means of funding legal services for the needy, a system providing over $200 million per year to fund legal services,[12] but contributed to the morass of takings law by glossing over complicated valuation issues.

In its decision, the Court announced two compensation rules that it treated as unexceptional: (1) takings are to be valued by the property owner's harm and not the government's gain; and (2) the property owner's harm consists of the "net" loss to the value of her property.[13] There are two distinct bases for criticizing this holding. Most profoundly, adopting any new compensation rule before resolving the fundamental conflicts in takings law is potentially counterproductive, like a doctor prescribing medicine before she knows what's wrong with her patient. Subsequent courts may find that compensation rules departing from the broad fair market value standard are at odds with the interests actually implicated in the cases before them. By failing to appreciate the relationship between compensation and takings law's normative goals, courts are letting the medication dictate their diagnosis, or simply prescribing the wrong medication altogether. Until the relationship between compensation and underlying takings theories is better understood, fixed rules constraining courts' valuation decisions can only lead to greater incoherence.

This short Essay, however, does not begin the interesting but difficult task of reconciling compensation with different conceptions of takings law but instead takes the net harm rule essentially on its own terms, arguing that it is problematic both doctrinally and under the familiar economic account of the Takings Clause.[14] Specifically, *Brown*'s net harm rule interferes with efficient regulatory incentives, is inconsistent with other cases, and elevates to constitutional status fees and other administrative expenses that may, on their own, lie far outside the reach of takings challenges. In short, applying net harm as a new valuation rule in future cases may have far broader consequences than the Court intended.

This Essay seeks to avoid these problems by arguing that *Brown* is better understood as a particular application of the fair market value standard. If,

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11. *Brown*, 123 S. Ct. at 1421.

12. *Id.* at 1412.

13. *Id.* at 1419-20, 21 ("Any pecuniary compensation must be measured by . . . net losses rather than the value of the public's gain.").

14. This is not to privilege an economic account of the Takings Clause, but the goal of encouraging efficient regulatory incentives is familiar in the literature and provides a ready basis for judging the Court's rule.

instead of valuing the interest in the IOLTA accounts itself, the Court was valuing the more abstract right to earn interest—i.e., one stick in the bundle of property rights associated with clients' principal in the IOLTA accounts—*Brown* stands for the unremarkable proposition that takings are to be measured by the fair market value of the property taken.[15] Ultimately, this Essay argues that the fair market value standard is broad enough to encompass the net harm rule. This Essay's surprising conclusion is that *Brown*, seemingly one of the most important valuation cases in recent years, is actually quite prosaic. It is perhaps an unusual project to argue that a Supreme Court opinion is far less interesting than it purports to be, but it is a critical project if courts are to retain the flexibility necessary to award appropriate compensation in the future. Instead of eliciting from *Brown* some new compensation rule, courts valuing takings should recognize that fair market value is a flexible standard permitting a variety of approaches, all of which—including the net harm rule in *Brown*— may constitute just compensation.

Part I of this Essay examines the Court's decision in *Brown* and traces the negative economic and doctrinal consequences of applying the Court's net harm rule literally in other takings contexts. Part II proposes an alternate interpretation of *Brown*, focusing on the nature of the property at issue and demonstrating that net harm is, in fact, better understood as a species of fair market value.

## I. THE PROBLEM WITH NET HARM

### *A.* Brown v. Legal Foundation of Washington

Following changes in federal banking laws permitting federally insured banks to pay interest on demand deposits by individuals and charitable organizations, every state in the nation adopted some form of an IOLTA program requiring attorneys to deposit client funds in interest-bearing accounts, with the interest payable to charitable organizations providing legal services to the poor.[16] Washington's IOLTA program is typical. The Court in *Brown* identified its four essential features:

> (a) the requirement that *all* client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the Legal Foundation of Washington (Foundation), and (d) the requirement that the Foundation must use all funds received from IOLTA accounts for tax-exempt law-related charitable and educational purposes.[17]

This program was challenged by two plaintiffs whose funds on their own would

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15. *See* cases cited *supra* note 1.

16. *Brown*, 123 S. Ct. at 1411.

17. *Id.* at 1413.

not have earned positive net interest and were therefore deposited into an IOLTA account.

*Brown* was the Supreme Court's second substantive review of a state's IOLTA program. In a prior opinion, *Phillips v. Washington Legal Foundation*,[18] the Court addressed the question of whether interest accruing in IOLTA accounts was the clients' property.[19] The Court in *Phillips* held that "interest follows principal" and "regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal."[20] In short, yes. Interest actually accruing in IOLTA accounts belongs to the client.

*Phillips* was a peculiar case procedurally. There, the Court addressed only who owns the interest in IOLTA accounts and did not reach the underlying takings issue. A dissent by Justice Souter pointed out that the Court's decision did not adjudicate a case or controversy within the meaning of Article III.[21] The Court's ownership determination had no effect on the rights of the parties without a resolution of the takings issue motivating the dispute. The Court in *Phillips* appeared to hold simply that interest on IOLTA accounts was the property of the client. Nevertheless, this holding set the stage for the constitutional challenge in *Brown*. If interest in the IOLTA accounts was the property of the owners of the principal, then it would seem naturally to follow that the government may not take that interest without paying compensation.

Washington State's IOLTA program, however, was carefully crafted with the takings issue in mind. An essential feature of the program was its applicability only to funds that would not have generated sufficient interest to pay for the administrative expenses of maintaining a separate interest-bearing account.[22] In other words, but for the IOLTA program and the pooling of clients' funds in large interest-bearing accounts, the value of the net interest generated by an individual client's funds was zero. In a very real sense, then, Washington's IOLTA requirements only deprived clients of money they would not have received but for the IOLTA program. As the Washington Supreme Court found in rejecting

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18. 524 U.S. 156 (1998).

19. *Id.* at 160 ("The question presented by this case is whether interest earned on client funds held in IOLTA accounts is 'private property' of either the client or the attorney for purposes of the Takings Clause of the Fifth Amendment.").

20. *Id.* at 168.

21. *Id.* at 172 (Souter, J., dissenting) ("I do not join in today's ruling because the Court's limited enquiry has led it to announce an essentially abstract proposition.").

22. The Supreme Court quoted Washington's findings:

> In conformity with trust law, however, lawyers usually invest client trust funds in separate interest-bearing accounts and pay the interest to the clients whenever the trust funds are large enough in amount or to be held for a long enough period of time to make such investments economically feasible, that is, when the amount of interest earned exceeds the bank charges and costs of setting up the account.

Brown v. Legal Found. of Wash., 123 S. Ct. 1406, 1413 (2003).

a similar takings challenge, the "program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances."[23]

Relying on the reasoning in *Phillips*, the Court found that forcing the transfer of interest from the IOLTA account to the Legal Foundation of Washington constituted a *per se* taking of the plaintiffs' property.[24] In the Court's view, *Phillips* left no doubt that a taking had occurred. The only question—and the issue at the heart of the Court's decision—was "whether any 'just compensation' is due."[25]

Turning to the problem of valuing the plaintiffs' takings claim, the Court observed:

> All of the Circuit Judges and District Judges who have confronted the compensation question, both in this case and in *Phillips*, have agreed that the "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. This conclusion is supported by consistent and unambiguous holdings in our cases.[26]

The Court then reasoned as if its ultimate conclusion followed necessarily from this observation. Because attorneys were required to deposit client funds in a non-IOLTA account "whenever those funds could generate net earnings for the client,"[27] those clients whose funds would not generate net earnings were unharmed when forced to deposit their money in IOLTA accounts. Therefore, according to the *Brown* majority, while a taking had occurred, the property owners were not entitled to compensation.[28] As the Court noted in its final footnote, "just compensation for a net loss of zero is zero."[29]

The opinion in *Brown* was written over a biting dissent. Justice Scalia, joined by Chief Justice Rehnquist, and Justices Kennedy and Thomas, objected to the majority's reasoning and principally to the majority's focus on net damages. The dissenters characterized the majority's opinion as "a novel exception to our oft-

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23. IOLTA Adoption Order, 102 Wash. 2d 1101, 1108, *quoted in Brown*, 123 S. Ct. at 1414.

24. *Brown*, 123 S. Ct. at 1419 ("We agree that a *per se* approach is more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis."). This distinction dates back to *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 115-18 (1978), in which the Court identified essentially *ad hoc* factors for courts to consider in order to determine whether a taking had occurred.

25. *Brown*, 123 S. Ct. at 1419.

26. *Id.*

27. *Id.* at 1421.

28. Conceptually, there is no reason not to separate the question of when a taking has occurred from the calculation of damages. However, not all courts have acknowledged the possibility of such a distinction. *See, e.g.*, A.A. Profiles, Inc. v. Fort Lauderdale, 253 F.3d 576, 582 (11th Cir. 2001) (holding that district court was not free "to revisit, in the guise of determining the proper damages, the issue of whether a taking occurred").

29. *Brown*, 123 S. Ct. at 1421 n.11.

repeated rule that the just compensation owed to former owners of confiscated property is the fair market value of the property taken."[30]

According to Justice Scalia, the majority's opinion was motivated purely by its desired outcome. He wrote:

> Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts . . . that the normal rules of the Constitution protecting private property are suspended.[31]

Properly understood, however, the Court's net harm rule is both less novel than the dissent admits, and less straightforward than the majority claims. By arguing about which bright-line compensation rule to apply, the Court as a whole obscured what might otherwise have been a relatively straightforward application of fair market value. Taken at face value, the Court's rule creates problems both by requiring takings to be valued by harm instead of gain, and by valuing that harm by the property owner's *net* harm.

### *B. Harm Versus Gain*

According to the Court, its "consistent and unambiguous" precedent established that takings are to be measured by the property owner's harm and not the government's gain.[32] To cast the choice in more familiar legal terms, the Court adopted a damages remedy as opposed to a restitutionary remedy.[33] In fact, the precedent is neither unambiguous nor consistent. When the government is functioning in a commercial or quasi-commercial capacity, courts have been willing to consider a gain-based award.[34] The Court's choice was therefore less

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30. *Id.* at 1422 (Scalia, J., dissenting).

31. *Id.* at 1428. Despite Justice Scalia's dismissiveness, is it so surprising that courts' application of the Takings Clause might depend on their view of the legitimacy of the governmental purpose? *See* John C. Cooke & Christine Carlisle Odom, *Judicial Deference to Local Land Use Decisions and the Emergence of Single-Class Equal Protection Claims*, 30 ENVTL. L. REP. 11049 (2000) (identifying cases in which courts focused on governmental bad faith).

32. *Brown*, 123 S. Ct. at 1419.

33. *See generally* Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 Tex. L. Rev. 1879 (2001). For an examination of the significance of this distinction, see HANOCH DAGAN, UNJUST ENRICHMENT 2-22 (1997). *See also* Michael Heller & Christopher Serkin, *Revaluing Restitution: From the Talmud to Postsocialism*, 97 MICH. L. REV. 1385, 1396 (1999) (reviewing Dagan's work).

34. *See* Tenn. Valley Auth. v. Pawelson, 319 U.S. 266, 281-82 (1943) ("[T]he sovereign must pay only for what it takes, not for opportunities which the owner may lose."); *see also* Francini v. Town of Farmington, 557 F. Supp. 151, 157 (D. Conn. 1982) ("[I]t is well-settled that a constitutionally cognizable 'taking' requires the sovereign to pay for what it actually gains, not for what the plaintiff has lost."); Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 407 (1989)

obvious than it might seem and, if interpreted as a concrete compensation rule, will eliminate compensation that might actually lead to more efficient regulatory incentives.[35]

Viewed systemically in terms of its incentive effects, a harm-based (damages) award encourages only efficient governmental actions. Where the government's gain exceeds the property owner's harm, i.e., where it creates more benefit to the government than harm to the property owner, a harm-based award permits the government to capture the excess benefit created by its action. Conversely, where the government acts inefficiently, and the property owner's harm is greater than the government's gain, the government will have to pay more than it benefits. This is the standard economic justification for the Takings Clause offered by countless commentators.[36]

A gain-based (restitutionary) award, on the other hand, would seem to over-deter governmental actions. Forcing the government to disgorge all of the benefits of an undertaking will create an *ex post* damage award that functions as an *ex ante* disincentive to take the property in the first place.[37] If, in other words, the government will be unable to reap any benefit from its action—whatever those benefits may be in a particular case—its incentive to act will be greatly diminished. The government will be better off operating in the open market and negotiating for some division of the anticipated gain with the present owner than it will be if it has to repay the full value of the benefits generated by its action.

These preliminary analyses only hold true, however, if compensation calculations include an economically full measure of harm and gain. Many courts and commentators have observed this often is not the case.[38] For example, most

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("The sovereign must pay for what it takes, not for opportunities the owner loses.").

35. There is no doubt that restitution, like full indemnification, has largely been rejected by the federal courts as a basis for recovery. *See* Merrill, *supra* note 5, at 118. Nevertheless, gain-based awards have persisted explicitly in some limited circumstances. *See supra* note 34. In addition, some commentators have noted that limiting compensation to the property's fair market value, instead of indemnifying the property owner for the full value of her loss, amounts to compensating based on the government's gain and not the property owner's loss. *See* Schill, *supra* note 6, at 890 n.245.

36. *See, e.g.*, Bell & Parchomovsky, *supra* note 6, at 290. While there is reason to be skeptical of this account, it captures a straightforward and familiar intuition. *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 (2000) (arguing that governments do not internalize costs the same way that private actors do).

37. *See* DAGAN, *supra* note 33, at 15. Dagan has examined how damage awards can create a systemic pressure that serves as an *ex post* property rule.

38. *See, e.g.*, Ga. Pac. Corp. v. United States, 640 F.2d 328, 361 n.43 (Ct. Cl. 1980) ("For example, spoilation of inventory and equipment, reduction in loss of goodwill and profits, expenses incurred in having to readjust manufacturing operations, frustration of contract or business, loss of business, and incurrence of relocation expenses incident to a taking are deemed non-recoverable consequential damages."); Richard A. Epstein, *Whose Democratic Vision of the Takings Clause? A Comment on Frank Michelman's Testimony on Senate Bill 605*, 49 WASH. U. J. URB. &

takings impose a number of costs that are not included in any harm-based measure of compensation actually applied by courts. The Supreme Court has expressly forbidden compensation for a property owner's subjective harm.[39] Likewise, damage awards for takings do not include compensation for consequential damages or other costs imposed on the property owner as a result of the government's action.[40] Limiting compensation to the property owner's objective, non-consequential damages, then, may not actually promote efficient governmental actions. Where, on the facts of a particular case, the benefit to the government is less than the *non*-compensable harm imposed on the property owner, harm-based compensation may result in tacitly encouraging inefficient regulatory incentives.

To concretize this discussion, imagine a public project, like the creation of a new park, that is worth $100 to the government. In order to create the park, the government will have to condemn a home with a fair market value of $75. On its face, this appears to be an efficient project, creating a net societal benefit of $25, even if the government must pay to fully compensate the property owner's objective harm. If, however, real but non-compensable harms, like moving expenses or subjective value attached to the home, impose an additional $40 worth of harm to the property owner, the park will create a net inefficiency of $15. The government is still likely to pursue the project, however, because it must only internalize the property owner's objective harm. Therefore, where non-compensable damages are particularly high, a harm-based award may, in fact, permit some measure of fiscal illusion and actually encourage inefficient regulatory incentives.[41]

Similarly, most benefits to the government are too difficult to measure for courts to include in restitutionary awards.[42] It is no simple task, for example, to

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CONTEMP. L. 17, 19 (1996) (identifying reasons why market value of the property taken fails to compensate property owners for additional "real" damages they suffer); Merrill, *supra* note 5, at 111 ("[J]ust compensation means incomplete compensation.").

39. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949). This rule excludes compensating for any private property owner's unique use of her property. However, state courts may sometimes award replacement value for certain unique-use property. Replacement value is expressly approved as an award for so-called special use property. *See, e.g.*, Grammercy Boys' Club Assoc. v. City of New York, 141 A.D.2d 365 (N.Y. App. Div. 1988) (awarding replacement value for clubhouse); City of Rochester v. Ryan & McIntee, Inc., 56 A.D.2d 715 (N.Y. App. Div. 1977) (funeral parlor); Sons of Israel v. State, 54 A.D. 2d 794 (N.Y. App. Div. 1976) (synagogue).

40. *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 33 (1985); Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1581 (Fed. Cir. 1990).

41. This entire discussion assumes, as do most property theorists, that governmental actors are moved by fiscal considerations. *See* Schill, *supra* note 6. This assumption has recently been problematized, at least at the margin, in a recent article. *See* Levinson, *supra* note 36; *see also* Schill, *supra* note 6, at 859-60 (suggesting a similar critique but also offering some empirical refutations).

42. *See* Merrill, *supra* note 5, at 129 ("Determining the value to the taker would be difficult, because the takings power is often used for public projects, such as highways, parks, or a clean

measure the value to the government of an environmental regulation. Even where the government is functioning in a commercial or quasi-commercial capacity, the full extent of its gains may not be reflected in the going concern value of the enterprise.[43]

These observations are not intended to suggest that present compensation rules are necessarily inadequate. Different accounts of the Takings Clause that do not focus on the government's incentives would, presumably, result in a qualitatively different understanding of the adequacy of current compensation practices. The impracticality of, and inefficiencies associated with measuring subjective harm or gain, also justify their exclusion from just compensation in most cases. But even under a straight economic account the possibility of asymmetrical, non-compensable harms or gains means that the most effective compensation regime is one in which courts have discretion to shift between harm and gain-based awards, depending on the facts of a particular case. A harm-based award is the presumptive norm—courts apply it in most cases, especially where the government's gain is difficult to value and the property owner's objective harm is likely to be the most significant portion of her total harm. But a restitutionary award may be appropriate where the government's gain is easy to measure as, for example, when the government is functioning in a commercial capacity and it seems, because of the nature of the property at issue, the property owner's subjective harm or consequential damages may lead to inefficient incentives if excluded. In fact, some courts have at least acknowledged this possibility.[44] The Court's decision in *Brown* threatens to eliminate this kind of inquiry by holding that compensation for takings is to be measured exclusively by the property owner's harm.

### *C. Net Harm*

Not only does the Court's rule in *Brown* require compensation to be measured by the property owner's harm instead of the government's gain, it also requires compensating only for net harm. This is in tension with other Supreme Court precedent. In the famous case of *Hodel v. Irving*,[45] the Court could have

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environment, that have no commercial measures of value.").

43. For example, in *Minneapolis Community Development Agency v. Opus Northwest, LLC*, 582 N.W.2d 596 (Minn. Ct. App. 1998), the City of Minneapolis condemned two prime, downtown lots which it then conveyed to the operator of a Target Store. "The city wanted to locate a . . . Target store [downtown] to attract shoppers." *See* John Windrow, *Downtown Target Store OK'd [sic] Without Office Tower*, STAR TRIB., June 27, 1998, at A1, *quoted in* Note, *Can Government Buy Everything?*, 87 MINN. L. REV. 543, 556 n.86 (2002). The value to the city of attracting shoppers would not have been included in the market value of the two condemned lots.

44. *See* United States v. 0.88 Acres of Land, 670 F. Supp. 210 (W.D. Mich. 1987) ("[D]amages for the loss of goodwill or loss of the going-concern value of a business are not compensable *unless the government has condemned the business property with the intention of carrying on the business.*") (emphasis added).

45. 481 U.S. 704 (1987).

rejected the plaintiffs' takings claims by redefining their damages in terms of net harm. Its decision not to do so demonstrates both the limits of the Court's reasoning in *Brown*, and the impracticability of adopting a one-size-fits-all valuation rule in takings cases generally.

In *Hodel*, the Supreme Court struck down as unconstitutional a law seeking to remedy fractionated ownership interests in Indian-owned land. In a series of land acts from the early Nineteenth Century, the United States allotted certain lands to individual members of Indian tribes.[46] Under this scheme, allotted lands were held in trust by the government for the benefit of the individual tribe-members.[47] Presumably to prevent exploitation, those beneficial interests were made non-saleable and could only be transferred, by will or intestacy, at the death of the tribe-member.[48] The property interests, often leased to third parties, were therefore passed down to multiple offspring through the generations and quickly became so fractured that "'numerous cases exist[ed] where the shares of each individual heir from lease money may be 1 cent a month.'"[49] In order to overcome the inefficiencies resulting from fractured ownership, Congress, in 1983, passed a law applying to property interests that had become so diffuse they were no longer valuable to the individual tribe members. Such property, according to the statute, would escheat to the state.[50] In other words, Congress sought to re-aggregate property interests that had grown inefficiently fractured over time.[51]

The Court in *Hodel* concluded that the statute effected a taking of the allottees' property without just compensation despite recognizing that the administrative costs associated with the highly fractionated tracts were higher, and sometimes much higher, than the value of the tracts themselves.[52] In other words, the net value of the interest produced by many of the allottees' property was zero. While the Court did not expressly consider the compensation question in *Hodel*, it nevertheless struck down the statute and reaffirmed its holding ten years later in *Babbitt v. Youpee*.[53]

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46. *Id.* at 707.

47. *Id.* ("In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the allotted lands were to be held in trust by the United States.").

48. *Id.*

49. *Id.* at 708 (quoting 78 CONG. REC. 11728 (1934)).

50. In order to accomplish its goals, Congress provided that no fractional interest in the allotted land could be passed down through intestacy or devise "if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." *Id.* at 709 (quoting 96 Stat. 2519).

51. For an excellent analysis of the problem Congress was attempting to solve, see Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685-88 (1998).

52. *See Hodel*, 481 U.S. at 713 (describing one tract valued at $8000 with yearly administrative costs in excess of $17,000).

53. 519 U.S. 234 (1997).

The failure of the Court in *Brown* to cite *Hodel* is perhaps surprising.[54] *Hodel* and *Brown* have a lot in common. In both cases, the Government was seeking to overcome barriers to combining property into more efficient parcels. In *Brown*, the barriers included various forms of transaction costs.[55] In *Hodel*, the barrier was a law, namely the original allotment scheme. But in both cases, the government was aggregating property where private markets could not.[56] In both cases, too, the government only deprived owners of property that was worth less to them than the administrative costs imposed by the property.

There is one obvious distinction between these two cases. In *Hodel*, the government bore the administrative costs. The allottees therefore received their share of rent from their property without any reduction for those costs. In the IOLTA program at issue in *Brown*, any client wishing to receive interest from her funds would herself be responsible for the fees associated with an interest-bearing account. But this difference—who bore the administrative costs prior to the taking—should be a difference without constitutional significance.

Where the administrative costs happened to lie in *Hodel* is a contingent historical fact. But for a political bargain struck towards the end of the Nineteenth Century, the allottees' interests could have been paid net of any administrative costs associated with the allotment. Under the Court's reasoning in *Brown*, and all else being equal, Congress today would be able to eliminate the allottees' interests without paying compensation if the administrative costs had been allocated differently. *Brown* therefore threatens to constitutionalize administrative costs.

It is well established that administrative fees, taxes and other exactions are not compensable takings of private property.[57] If Congress could shift the administrative costs of the land acts to the allottees without effecting a taking, either by passing on the costs directly, or by imposing some nominal service charge,[58] then Congress could subsequently eliminate the allottees' smaller

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54. The failure of *Hodel* to discuss compensation is also interesting. Instead of ordering the case transferred or remanded to the Court of Claims for a valuation inquiry, the Court struck down the statute in its entirety, the remedy the plaintiffs in *Brown* were surely seeking.

55. Transaction costs here include both actual bank fees and free-rider, holdout, and collective action problems.

56. Some might object that a private party could also overcome transaction costs and create, in effect, a private IOLTA program. It is ultimately an empirical question whether the market for interest on escrow accounts is such that a private actor could not create a private IOLTA program. It is sufficient for this Essay to note that the absence of any privatized IOLTA plans is at least evidence that such plans could only be created by the government.

57. *See, e.g.*, United States v. Sperry Corp., 493 U.S. 52 (1989) (finding no taking where federal government imposed fee on tort award as reimbursement for its costs); Student Loan Mktg. Assoc. v. Riley, 104 F.3d 397 (D.C. Cir. 1997) (holding imposition of fee on student loans is not a taking); Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) (finding no taking where city ordinance conditioned non-resident building permits on payment of fee).

58. The result of a taking analysis is by no means a foregone conclusion, and courts might be willing to find such exactions to be a taking. But Congress at least could make a credible

interests altogether under a literal interpretation of *Brown*'s net harm rule. But, if switching who bears fees is not an act of constitutional significance, it is difficult to see why this should convert an impermissible law into legislation for which no compensation is due. Has *Brown* therefore implicitly overruled *Hodel*? Surely the Court in *Brown* did not believe it was reversing its own recent precedent *sub silentio*. But the Court's rule, applied literally, elevates to constitutional status fees and other administrative expenses that may, on their own, lie far outside the reach of takings challenges.

An additional problem with valuing takings by *net* harm is posed by the question, "net of what?" What fees, costs, or expenses are offset against the value of the property taken? Future courts could draw the rule narrowly, including only administrative expenses associated with extracting value from the property.[59] Or, if the rule is construed more broadly, its reach could include deductions for taxes associated with the property, or any other fees imposed from whatever source. As the dissent admonished, however, "if the Federal Government seizes someone's paycheck, it may not deduct from its obligation to pay just compensation the amount that state and local governments would have taxed, on the ground that it need only compensate the 'net loss' to the former owner."[60] What costs should courts include in determining net harm? The Court in *Brown* did not even begin to answer this question.

Perhaps principled lines could be drawn around the net harm rule, but courts have not proven particularly adept at linedrawing in this area.[61] While this Essay contends that flexibility is important in valuing takings claims, unprincipled and under-theorized flexibility can only further destabilize takings law. In short, taken literally, the Court's net harm rule is difficult to apply, improperly limits courts' flexibility, and is inconsistent with other Supreme Court precedent.

## II. NET HARM AS A SPECIES OF FAIR MARKET VALUE

### *A. Redefining the Property at Issue*

Net harm, read as a new compensation rule, raises all of the difficult problems identified in the previous section. To avoid these problems, the Court's rule should be understood instead as nothing more than a fact-specific application

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argument that imposing such costs on the allottees as a group is not a taking, either under the *Penn Central* diminution of value test, or under the theory that the government may impose special use taxes without effecting a taking.

59. As the dissent pointed out, the narrowest construction of the Court's net harm rule would offset only the value created by the government itself, but this interpretation is squarely at odds with recent Supreme Court precedent. *See Brown*, 123 S. Ct. at 1425 (Scalia, J., dissenting) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)).

60. *Id.* at 1426-27 (Scalia, J., dissenting) (internal quotation marks omitted).

61. For an excellent treatment of the problems associated with such linedrawing, see generally Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002).

of the traditional fair market value standard. Because both the majority and the dissent in *Brown* chose to characterize the rule as something new and different, however, they obscured its close relationship with other cases valuing just compensation and its relatively benign precedent for future cases.

The confusion may come in part from a hidden controversy over the nature of the property at issue. As the dissent observed, the majority's opinion is potentially ambiguous about the property it is purporting to value. According to Justice Scalia, the majority adopted two inconsistent approaches to measuring just compensation. Either "just compensation is the interest petitioners *would have earned* had their funds been deposited in *non-IOLTA* accounts,"[62] or "just compensation is the amount of interest *actually earned* in petitioners' IOLTA accounts, minus the amount that would have been lost in transaction costs had petitioners sought to keep the money for themselves."[63]

There are strong arguments suggesting that either characterization is seriously flawed. If the property taken was the actual interest earned in the IOLTA accounts, then its fair market value could not seriously have been in question. The value of $4.96 is, by definition, $4.96. For the Court to conclude that zero compensation was due, it must therefore have offset bank fees and administrative expenses from the apparently concrete fair market value of the interest itself. The Court, in other words, must have identified the value of the property and then, in a discrete second step, calculated the owners' net harm. This approach implicates all of the problems identified in Part I of this Essay.

But as the dissent correctly observed, the alternative interpretation fares no better because "just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist."[64] In other words, the clients' funds did, in fact, earn interest in the IOLTA accounts and that interest was taken at the moment it was transferred to the Legal Foundation of Washington. In this situation, it seems entirely beside the point to value the taking by the interest the clients' funds would have earned if they had been placed in a non-IOLTA account.

There is, however, a third option. If, instead of valuing the interest itself, the Court was valuing the *right to earn interest*, a right that was categorically taken by the IOLTA program, the net harm rule becomes a fact-specific application of the fair market value standard. There is no doubt the Court believed it was doing something different than this Essay proposes. The Court's focus on the actual expropriation of specific property is arguably inconsistent with recharacterizing the property as the right to earn interest.[65] This presents a difficult choice. Either *Brown* was correct about the nature of the property it was valuing but announced

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62. *Brown*, 123 S. Ct. at 1423 (Scalia, J., dissenting) (emphasis in original).

63. *Id.* (Scalia, J., dissenting) (emphasis in original).

64. *Id.* at 1424 (Scalia, J., dissenting).

65. *Brown* held specifically that the IOLTA program effected a taking when interest from the IOLTA accounts was transferred to the Legal Foundation of Washington. *See id.* at 1419 (citing, inter alia, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for the proposition that permanent physical occupations are *per se* takings).

a new valuation rule that is inconsistent with existing case law and leads to anomalous results in the future, or *Brown* misunderstood the property it was valuing but, once properly understood, followed an uncontroversial valuation approach. The latter option is not only preferable as a means of synthesizing *Brown* with prior cases, it is essential if courts are to avoid the problems identified in Part I and retain the discretion necessary to award compensation responsive to the Takings Clause's contested goals.[66]

### *B. Valuing the Right to Earn Interest*

At first glance, it may seem wholly facile to suggest any meaningful distinction between the value of the interest itself and the value of the right to earn interest. Put another way, why should the underlying value of the property be affected by its characterization either as a Blackstonian "res"[67] or a modern-day stick in a bundle of property rights?[68] Redefining the property at issue is a familiar rhetorical move in property law, but what difference does it make to the actual valuation of the property? As it turns out, it can make a significant difference.

In contrast to the value of the interest actually earned in an account, the value of the right to earn interest cannot be measured directly. It is dependent upon interest rates, the length of time for which the money must be held, as well as expenses associated with setting up and maintaining the account. If a client's funds would not have been capable of generating net positive interest for the client, she will assign zero value to the right to earn interest. The right to earn interest will, in other words, have a fair market value of zero. As one of the dissenters wrote in the Ninth Circuit's review of Washington's IOLTA program: "The fair market value of *a right to receive* $.55 by spending perhaps $5.00 to receive it would be nothing."[69]

A simplified example demonstrates this basic insight. Imagine a client, with $100 to be deposited for ten days, choosing between two bank accounts. One

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66. *See supra* text accompanying notes 6-10.

67. Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 331 (1980) (discussing the physicalist conception of property and attributing this concept to Blackstone).

68. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Hohfeld is widely credited with providing the legal conception of property responsible for this metaphor. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 364-65 (2001).

69. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 883 (9th Cir. 2001) (en banc) (Kleinfeld, J., dissenting) (emphasis added), *quoted in*, *Brown*, 123 S. Ct. at 1420. The *Brown* majority did not identify the potential significance of this language but focused on it instead to criticize Justice Scalia, noting that, under his view, "the client should recover the $.55 of interest earned on a two-day deposit even when the transaction costs amount to $2.00." *Brown*, 123 S. Ct. at 1420 n.10.

account, call it Account X, earns no interest, and the other, Account Y, earns 5% interest over those ten days. At the end of ten days, Account X will still have $100 while Account Y will be expected to have $105. Putting aside the time value of money, the value of the right to earn interest on $100 of principle is $5.00 over the ten-day period and a client should be willing to pay up to $4.99 for that right. If, however, the client would have to pay $1.00 to withdraw money from Account Y at the end of the ten days, the value of the right to earn interest is reduced to $3.99. Other bank fees associated with Account Y—such as periodic maintenance fees or other fees associated with accounting for the money—might reduce the fair market value of the *right to earn interest* to zero although the amount of *interest actually earned* would remain $5.00. That is to say, a client would not be willing to pay any money for the right to earn interest on her $100 in client funds even though the funds would generate $5.00 in interest.

This difference between valuing the interest itself and valuing the right to earn interest determines whether fees and other expenses are included in the fair market valuation of the property or whether they must be subtracted in a second, distinct step to determine the property owner's net harm. The result is the same, but where fees fit in the calculation of damages is different. In other words, on the facts of *Brown*, the Court could have reached its same conclusion by applying a fair market value analysis that included fees and administrative expenses instead of crafting a novel net harm rule. Reconstrued as a case about valuing rights instead of an identifiable, discrete pool of money, *Brown* stands only for the proposition that takings are to be valued by the fair market value of the property taken.

Not only is *Brown* uncontroversial under this interpretation, but reconstruing net harm as part of the fair market value inquiry also makes the Court's approach consistent with a long line of cases that have valued undeveloped real property. Where the highest and best use of property would, for example, be the development of a shopping mall, just compensation for a taking or condemnation of that property is not simply the as-developed value of the property. Instead, it is the as-developed value minus the cost of developing the property.[70] Naturally, any market price for the undeveloped property would incorporate the anticipated expenses of developing the property into its highest and best use.[71]

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70. *See* United States v. 125.07 Acres of Land, 667 F.2d 243 (1st Cir. 1981). The court described fair market value determinations to include

> first, the hypothetical value of the property when developed to and sold at its highest and best use (the "gross value"); second, the costs of developing the land from its present state to the highest and best use (the "development costs"); and, third, the present fair market value of the tract, determined by subtracting the development costs from the gross value.

*Id.* at 249.

71. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994). In *Loveladies*, a Claims Court entered judgment for the plaintiff in the amount of $2,658,000 for a denial of a permit by the Army Corps of Engineers to fill in 11.5 acres of wetlands. Plaintiffs

Compensating for the as-developed value of the presently undeveloped property, without any reduction for the costs the owner would have borne to develop the property, would make the property owner far better off than if she had actually developed the property herself. Fair market value, in other words, is net of the costs required to develop the property.

When courts value undeveloped land by the property's highest and best use, minus development costs the property owner would have incurred, there is considerable debate about what costs to include. The higher the development costs a court will award, the lower the property owner's recovery. This tracks the commonsense intuition that the value of a piece of property will decline as the costs of developing it increase.[72] But courts have a difficult time determining what costs to include in their valuations. Should they include only the building costs themselves, or also insurance costs, permitting fees, and perhaps architectural plans? Should the costs be increased to reflect the possibility of permit denials or other risks? Is the cost of borrowing funds included in development costs, because the property owner would not have paid cash for her project?[73]

The answer, in short, is that courts retain flexibility to determine what expenses to include but are ultimately governed by the fair market value standard. In reality, the allocation of development costs between the buyer, the seller, the building contractor and the financial lender, and any other relevant parties to a building project, is dependent on the specific market. But too individualized an assessment of these costs can run counter to the Supreme Court's admonition not to base just compensation on the subjective damages of the individual property owner. So, for example, if a specific developer, like Wal-Mart, would in fact have faced increased development costs because of local public opposition to

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claimed that the highest and best use of the property was as a 40-lot residential development, the gross value of which was estimated at $3,720,000. *See id.* at 155. The court reduced this amount by costs the landowner would have incurred to develop the property. *See id.*

72. If there is any doubt about the relationship between the undeveloped value of land and the costs of developing it, environmental remediation provides a ready real-world example. If undeveloped land is found to be contaminated, such that expensive remediation would be required before it could be developed, the value of that land will be reduced by the anticipated costs of remediation resulting. Where environmental liabilities are sufficiently high, property owners may sometimes be willing to forfeit the property, or even pay someone to acquire the property, in exchange for the "buyer" assuming remediation costs. *Cf.* Housing Auth. of New Brunswick v. Suydam Investors, L.L.C., 826 A.2d 673, 688 (N.J. 2003).

73. *E.g.*, Bontrager v. Siskiyou County Assessment Appeals Bd., 118 Cal. Rep. 2d 182, 186 (Ct. App. 2002). Courts have included various combinations of these costs in valuing undeveloped property. *See* Herrington v. County of Sonoma, 790 F. Supp 909 (N.D. Cal. 1991) (reducing value of as-developed property by the chance that regulatory approvals would have been permissibly denied); Cooley v. United States, 46 Fed. Cl. 538, 551 (Fed. Cl. 2000) (reducing as-developed value of property by (1) "cost of sales, promotion and advertising"; (2) direct development costs; (3) indirect costs including real estate taxes and liability insurance; and (4) holding costs, including interest and financing).

Wal-Mart building a new store, a Court may exclude those considerations when identifying development costs. Likewise, the ability of a particularly powerful developer to extract concessions from local contractors may be ignored by courts, thus increasing the development costs of a project and limiting compensation.[74]

This same nuanced inquiry applies equally to the kinds of administrative expenses and fees that constitute net harm. Viewed as part of the fair market value standard, instead of as a new compensation rule, net harm includes generally those expenses and fees that are factored into the fair market value of specific property.[75] This is no more controversial than to suggest that the property tax assessment on a building will affect the price a buyer would be willing to pay to acquire it. But courts should also retain discretion to exclude expenses and fees that too closely resemble subjective harm—i.e., expenses and fees that are unique to the individual property owner. The answer to the question posed in Part I, then, is that compensation after *Brown* is net of those expenses that would have an impact on the fair market value of the property taken. While the outlines of this boundary may not be easily defined, focusing on fair market value provides courts with a principled basis for distinguishing between different kinds of fees and expenses, distinctions that are not necessarily available under a literal application of *Brown's* net harm rule.[76]

Whether or not *Brown* represents an appropriate application of the fair market value standard is a question that cannot be answered without a better understanding of the relationship between compensation and underlying takings theories. As a preliminary foray into the field, this Essay does not suggest where exactly to draw principled lines around the fees and expenses courts should include in their fair market value calculations. This will depend on the substantive constitutional interests at stake and how best to vindicate them. It is enough for now to recognize that the fair market value standard is sufficiently flexible to provide a framework for evaluating the valuation problems presented in any particular case. Keeping the compensation analysis focused on the fair market value standard will at least bring consistency to the terms of the valuation

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74. *See Cooley*, 46 Fed. Cl. at 551. There, plaintiff objected to the inclusion of certain development costs because the local market "is comprised of developers who would not have to pay for most of these costs, and these developers would accordingly value the property at a much higher price." *Id.* The Court rejected plaintiff's argument and allocated all of the development costs to the property owner, including insurance costs.

75. This Essay saves for another day a normative justification of net harm as an appropriate application of fair market value on the facts of *Brown*. If flexibility is important, as this Essay argues, courts must be able to justify their application of fair market value on the facts of a particular case. This, presumably, requires something more principled than the dissent's so-called Robin Hood taking. Developing a framework for evaluating the specific application of fair market value in a specific case is a project requiring more space than this short Essay provides.

76. How this would affect subsequent attempts by Congress to revise the Indian allotment schemes discussed in Part II is unclear. But this more sophisticated understanding of *Brown* at least provides a framework for analyzing the compensation problem and drawing principled distinctions between *Brown* and *Hodel*.

debate.

The dissent's exhortation that takings are to be measured by the fair market value of the property taken are ultimately correct but misdirected. The fair market value of the right to earn interest is, in fact, the property owner's net harm. *Brown's* result, in other words, should be characterized as an application of the broad fair market value standard. Reconceiving the nature of the property in *Brown* both aligns the case with a legion of precedent and limits its application in other cases. Future courts should not interpret *Brown* as creating some new valuation rule, but should instead cite *Brown* for the uncontroversial proposition that takings are to be valued by the fair market value of the property taken.

## CONCLUSION

On the facts of *Brown*, net harm is a species of fair market value. Any alternative interpretation threatens to elevate fees and other exactions to constitutional status. This would contravene long-established precedent, and it would also create facile mechanisms for governmental actors to avoid genuine takings problems. *Brown's* holding should instead be limited to the uncontroversial rule that takings are to be valued by the fair market value of the property taken.

# Indiana Law Review

**Volume 37** **2004** **Number 2**

# NOTES

## LACK OF INSURANCE COVERAGE FOR PRESCRIPTION CONTRACEPTION BY AN OTHERWISE COMPREHENSIVE PLAN AS A VIOLATION OF TITLE VII AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT—STRETCHING THE STATUTE TOO FAR

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### INTRODUCTION

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[1] Most women who want two children will spend an average of five years pregnant or trying to get pregnant and more than twenty years trying to prevent pregnancy.[2] Thus, a woman who wants the U.S. average of two children may have to use contraception for more than two decades.[3] There are sixty million women in the United States who are now in their childbearing years, approximately ages fifteen to forty-four.[4] Of the total number of U.S. women in their childbearing years, forty-two million (or seven out of every ten) are sexually active and do not wish to conceive.[5]

The availability of contraception has changed the lives of women. It is well established that the Constitution protects one's right to use birth control measures.[6] However, obstacles to the consistent use of contraceptives remain.

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1. Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

2. NARAL Pro-Choice America Foundation, *Insurance Coverage for Contraception Improves the Health of Women and Families*, Apr. 22, 2002, *at* http://www.naral.org/facts/insurancecov.cfm.

3. Roberta Riley, JD, and Carolyn Snape, *What's the Latest with Insurance for Contraception?*, HEALTH & SEXUALITY, Jan. 2, 2002, *at* http://www.arhp.org/healthcareproviders/onlinepublications/healthandsexuality/transdermal/insurance.cfm?ID=235.

4. *Id.*

5. *Id.*

6. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court held that a Connecticut statute that prohibited dispensing or use of birth control devices to or by married couples was a violation of the U.S. Constitution, finding that the right of privacy to use birth control measures is

One of the major barriers to universal access to contraception is the high cost: approximately $540 per year for oral contraceptives; $380 per year for Depo-Provera; and $400 for an intrauterine device (IUD).[7] The question remains who should bear this cost.

Many individuals who wish to use these types of contraceptives must pay the related costs themselves. More than two-thirds of adult women obtain their health insurance through employers.[8] Yet, a sizable percentage of employers' health insurance plans do not cover prescription birth control even though the plans offer comprehensive coverage for other prescription drugs.[9] Forty-nine percent of all typical large group plans do not routinely cover any contraceptive methods.[10] "Only fifteen percent of large group plans cover all five of the most commonly used reversible prescription methods."[11] Health Maintenance Organizations (HMOs) provide better contraceptive coverage than large group plans, but fewer than half (thirty-nine percent) cover all five of the most common reversible prescription methods.[12] Participants in those plans are now arguing to the courts that the failure of employers to provide coverage for prescription contraception is a form of sex discrimination.[13]

Specifically, the federal courts are being asked to decide if the exclusion of prescription contraception from an otherwise comprehensive medical plan constitutes discrimination against women in violation of Title VII of the Civil Rights Act,[14] as amended by the Pregnancy Discrimination Act.[15] As of this writing, only one federal court has decided the issue.[16] That court concluded that

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a legitimate one. The Supreme Court found a Massachusetts statute which prohibited the distribution of contraceptive devices to unmarried persons to be a violation of the U.S. Constitution in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). The Court reaffirmed this concept in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

7. Riley & Snape, *supra* note 3.

8. NARAL Pro-Choice America Foundation, *supra* note 2.

9. *See* Bill Rankin, *Paulding Duo Join Birth Control Coverage Debate; Hoping to Build on Precedent: Two Cases Making Their Way Through Federal Court*, THE ATLANTA JOURNAL-CONSTITUTION, July 24, 2002, at 5D; Center for Reproductive Rights, *Contraceptive Coverage for All: EPICC Act Is Prescription for Women's Equality*, Sept. 2002, *at* http://www.crlp.org/pub_fac_epicc.html.

10. Center for Reproductive Rights, *supra* note 9.

11. *Id.*

12. NARAL Pro-Choice America Foundation, *supra* note 2.

13. *See* Cynthia L. Cooper, *Women Fight for Insurance Equity in Court, at Work*, WOMEN'S ENEWS, July 1, 2002, *at* http://www.womensenews.org/article.cfm/dyn/aid/957 .

14. 42 U.S.C. § 2000e (1994).

15. *Id.* § 2000e(k).

16. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266 (W.D. Wash. 2001). In another case,

the exclusion did violate Title VII. Many other plaintiffs are waiting for their day in court.[17]

This Note argues that the recent federal district court decision holding that the failure of an otherwise comprehensive medical plan to cover prescription contraception is a violation of Title VII of the Civil Rights Act as amended by the Pregnancy Discrimination Act[18] stretches Title VII too far. While the availability of reliable contraception has undoubtedly had a significant and positive impact on the lives of women in this country,[19] it does not justify such a sweeping interpretation of that statute.

The exclusion of prescription birth control from an otherwise comprehensive health plan does not discriminate against women in violation of Title VII, as amended. First, contraception does not fall within the protection of the Pregnancy Discrimination Act, which prohibits discrimination on the basis of "pregnancy, childbirth, and related medical conditions." Secondly, the differences between prescription drugs in general and contraceptives make *contraception* the appropriate level of comparison between the coverage offered males and females. The challenged health plans do not cover the prescription contraception for males or females, and are therefore not discriminatory. Third, the exclusion of prescription contraception from coverage disadvantages both males and females. Finally, broadly reading Title VII to prohibit the exclusion of prescription contraception from an otherwise comprehensive health plan opens the door for requiring coverage of an untold variety of procedures and prescriptions when the use of such procedure or prescription applies to only one gender. This presents a genuine threat to the ability of many employers to provide coverage to employees in a time when health costs are already escalating at double-digit rates.[20]

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a federal district court denied the defendant-employer's motion to dismiss the plaintiff-employees' claim that its health plan's exclusion of prescription contraceptives constitutes sex discrimination in violation of Title VII. Cooley v. Daimler Chrysler Corp., 281 F. Supp. 2d 979 (E.D. Mo. 2003).

17. *See* EEOC v. United Parcel Serv., 141 F. Supp. 2d 1216 (D. Minn. 2001); Maudlin v. Wal-Mart Stores, Inc., No. 1:01-CV-2755-JEC, 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Aug. 23, 2002); *see also* Kaiser Daily Reproductive Health Report, *AT&T Employees Sue for Contraceptive Coverage Under Company's Health Insurance Plan*, Jan. 22, 2003, *at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=2&DR_ID=15626; Rita Rubin, *Battle over Contraceptive Coverage Heats up*, USA TODAY, May 8, 2002, at 8D.

18. *Erickson*, 141 F. Supp. 2d 1266.

19. *See* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363 (1998) (describing the positive impact access to contraception has had on American women).

20. *See* Milt Freudenheim, *The Healthier Side of Health Care*, N.Y. TIMES, Oct. 23, 2002, at C1 ("Health costs are spiraling into another year of double-digit increases. Patients, employers, and government health programs are feeling the financial pain."); Bill Brubaker, *Health Insurance Prognosis Is Poor; Survey of Employers Finds Premiums Rising, Coverage Shrinking*, WASH. POST, Sept. 6, 2002, at E01 ("Employers faced another year of double-digit rate increases—12.7 percent this year, the largest since 1990."); Associated Press, *Costs of Health Benefits Are Seen*

While many would argue that it is a shortsighted policy[21] on the part of the employer to exclude prescription contraceptives from coverage, this does not transform that failure into a violation of Title VII. Whether policy reasons justify requiring employer-sponsored private insurance plans to provide coverage for prescription contraception is an issue for the legislature, not the courts.[22]

Part I of this Note examines Title VII as amended by the Pregnancy Discrimination Act, its development and application by the courts. Part II discusses the facts, holding, and reasoning of *Erickson*, and the Equal Employment Opportunity Commission's "Commission Decision" issued in December 2000, both finding the exclusion of prescription birth control to be a violation of Title VII. Part III focuses on the arguments against interpreting Title VII so expansively. Part IV proposes that, notwithstanding the inapplicability of Title VII to the issue, it makes business sense for employers to include coverage for prescription contraceptives within an otherwise comprehensive health plan.

## I. TITLE VII AS AMENDED BY THE PREGNANCY DISCRIMINATION ACT AND RELATED CASE LAW

Title VII of the Civil Rights Act of 1964 declares it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."[23] Although

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*Rising by 15%*, N.Y. TIMES, Oct. 15, 2002, at C7; John M. Broder, *It's No Longer an Issue of Class; Middle-Class Are Among Newly Uninsured*, CHI. TRIB., Dec. 8, 2002, at C5 ("[T]he current slowdown and the rising cost of providing health care to employees produced a double whammy: Fewer companies are now willing to offer their workers health-care coverage, and those that do will ask them to bear a far higher share of the cost."); Gregory Weaver, *Health Care Hikes Steepest in Decade*, INDIANAPOLIS STAR, Nov. 17, 2002, at A1 ("Some are beginning to wonder if the day will come when employers no longer will be able to afford to provide subsidized health coverage for their workers.").

21. *See Improving Women's Health: Why Contraceptive Insurance Coverage Matters?: Hearing Before the Senate Committee on Health, Education, Labor, and Pensions*, 107th Cong. (2001) (statement of Jennifer Erickson).

22. Various legislative bodies are indeed addressing this issue. Twenty states have already passed legislation mandating coverage of prescription contraception by insurance plans that cover prescriptions in general. Those states are Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Missouri, New York, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, Texas, Vermont, and Washington. NARAL Pro-Choice America Foundation, *Insurance Coverage for Contraception: State Laws and Regulations*, Jan. 2003, *at* http://www.naral.org/facts/cont_cov_chart.cfm. A similar act at the federal level, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), was first introduced in the U.S. Congress in 1997, but has yet to be passed. *See* Center for Reproductive Rights, *supra* note 9.

23. 42 U.S.C. § 2000e-2(a)(1) (1994).

largely focused on race at the time of its enactment,[24] the purpose of Title VII is clearly to eliminate discrimination in the workplace on the basis of any of the listed factors.

In 1976, the Supreme Court decided *General Electric Company v. Gilbert*.[25] In that case, the defendant-employer provided disability benefits to its employees who became unable to work due to a nonoccupational sickness or accident. The plan, however, excluded pregnancy-related disabilities from coverage. Employees who had been denied the disability benefit for their pregnancy-related absences brought the action arguing that the exclusion of pregnancy-related disabilities from the benefit plan was a violation of Title VII of the Civil Rights Act of 1964.[26] The Court held in favor of the defendant, finding that an otherwise comprehensive short-term disability policy that excluded pregnancy-related disabilities from coverage did not discriminate on the basis of sex in violation of Title VII of the Civil Rights Act of 1964.[27]

According to the Court, it is only when there is such sex-based discrimination that a violation of Title VII exists. In this case, the employer merely excluded certain physical conditions from coverage but continued to cover the same categories of conditions for both men and women.[28] The Supreme Court held that "pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks."[29]

In response to the Supreme Court's *Gilbert* decision, Congress amended Title VII by passing the Pregnancy Discrimination Act (PDA).[30] Through its passage, Congress amended the definitional section of Title VII providing that, for purposes of Title VII, discrimination on the "basis of sex" includes, but is not limited to

> because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[31]

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24. *See* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

25. 429 U.S. 125 (1976).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 139.

30. *See* Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1400 (N.D. Ill. 1994) ("The PDA was enacted in large part in response to the Supreme Court's decision in *General Electric Co. v. Gilbert*.").

31. 42 U.S.C. § 2000e(k) (1994).

Congress made clear its dissatisfaction with the Court's decision in *Gilbert*[32] and confirmed its intent to ensure women affected by pregnancy or related conditions are treated in the same manner as others with similar abilities and limitations.[33]

Another significant case decided by the Court after *Gilbert*, but prior to the enactment of the PDA in 1978, is *City of Los Angeles, Department of Water & Power v. Manhart*.[34] Based on studies that showed females generally live longer than males, the Department of Water and Power withheld larger pension fund contributions from its female employees than its male employees. The pension plan at issue was entirely funded by the contributions of the employees and the Department and the earnings thereon.[35] Because its female employees, as a class, would live to draw more monthly retirement benefit payments from the fund, the Department demanded greater contributions from the female employees. The respondents initiated the action alleging the contribution differential violated Title VII of the Civil Rights Act of 1964.[36]

In finding the Department's pension funding scheme violated Title VII, the Court distinguished that plan from the benefit plan it had found lawful in *Gilbert*. The Court found that "each of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex. On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability."[37]

The Court emphasized that the focus of Title VII was to ensure fairness for the individual, not fairness to classes based on generalizations. There was no guarantee that any individual female employee would actually realize the return on her excess contribution through the receipt of excess monthly payments.[38] Thus, the differential was unlawful.

The Supreme Court had the opportunity to interpret Title VII as amended by the PDA in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.[39] In that case, the employer-defendant's medical plan provided less comprehensive benefits to the spouses of male employees than to female employees for pregnancy-related conditions. The Court held that this disparity violated Title VII. "Health insurance and other fringe benefits are 'compensation, terms, conditions, or

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32. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670 (1983) ("In 1978 Congress decided to overrule our decision in *General Electric Co. v. Gilbert* by amending Title VII of the Civil Rights Act of 1964.").

33. *See* Carney v. Martin Luther Home, Inc., 824 F.2d 643, 646 (8th Cir. 1987) ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment." (quoting S. Rep. No. 95-331 at 3, *reprinted in* Legislative History at 40)).

34. 435 U.S. 702 (1978).

35. *Id.* at 705.

36. *Id.* at 706.

37. *Id.* at 715.

38. *Id.* at 708.

39. 462 U.S. 669 (1983).

privileges of employment.' Male as well as female employees are protected against discrimination."[40] The Court reasoned that

> [t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees.[41]

The Court further examined Title VII as amended by the PDA in *International Union v. Johnson Controls, Inc.*[42] In that case, the employer-defendant's fetal protection policy excluded women who were pregnant or who were capable of bearing children from jobs involving lead exposure. The Court found that "[t]he bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."[43]

The Court denounced the employer's policy, stating, "Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone . . . . Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing."[44] The Court recognized the difference between childbearing and fertility. Johnson Controls' policy classified employees based on their potential for pregnancy, a uniquely female characteristic, as opposed to fertility. Thus, the Court found explicit sex discrimination and a violation of the PDA.

## II. TRIBUNALS FINDING THE EXCLUSION OF PRESCRIPTION CONTRACEPTION IS A VIOLATION OF TITLE VII

Prescription contraception has been available and popular for years. Despite this fact, only recently has the legal argument been advanced that the failure of an otherwise comprehensive insurance plan to cover the expense of prescription contraception is discriminatory in violation of Title VII.[45] This section will examine the facts and the reasoning of two recent decisions that endorse that proposition.

### *A. The* Erickson *Decision*

Jennifer Erickson, a twenty-six year old pharmacist, believed it was unfair that her employer's medical plan did not cover her oral contraceptives. She

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40. *Id.* at 682.

41. *Id.* at 684.

42. 499 U.S. 187 (1991).

43. *Id.* at 197.

44. *Id.* at 198.

45. *See* Planned Parenthood Federation of America, *Some States Now Requiring Contraceptive Coverage*, Dec. 21, 2002, *at* http://www.covermypills.com/latest/index.asp?id=47.

found herself paying the entire expense, in excess of $300 annually, out of pocket.[46] Although her employer's plan did not cover her birth control pills, it did cover other prescription drugs, including a number of preventive drugs and devices.[47] Erickson, with help from Planned Parenthood, took her employer to court, arguing its health plan violated Title VII, as amended by the PDA, because it excluded prescription contraceptives. The question before the court was whether the selective exclusion of prescription contraceptives from defendant's generally comprehensive prescription plan constituted discrimination on the basis of sex in violation of Title VII of the Civil Rights Act, as amended by the PDA.[48]

Bartell, the employer, made many arguments in defense of its health plan. Specifically the employer argued that:

> Opting not to provide coverage for prescription contraceptive devices is not a violation of Title VII because: (1) treating contraceptives differently from other prescription drugs is reasonable in that contraceptives are voluntary, preventative, do not treat or prevent an illness or disease, and are not truly a "healthcare" issue; (2) control of one's fertility is not "pregnancy, childbirth, or related medical conditions" as those terms are used in the PDA; (3) employers must be permitted to control the costs of employment benefits by limiting the scope of coverage; (4) the exclusion of all "family planning" drugs and devices is facially neutral; (5) in the thirty-seven years Title VII has been on the books, no court has found that excluding contraceptives constitutes sex discrimination; and (6) this issue should be determined by the legislature, rather than the courts.[49]

The court was not persuaded by any of these arguments. In holding that the exclusion was unlawful, the court reasoned that Congress had embraced the dissenting opinion in *Gilbert* when it enacted the Pregnancy Discrimination Act. "The intent of Congress in enacting the PDA, even if not the exact language used in the amendment, shows that mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."[50]

The *Erickson* court also relied upon the Supreme Court's decision in *Johnson Controls* in which the Court held that classifying employees on the basis of their capacity to become pregnant is sex-based discrimination. The *Erickson* court described the *Johnson Controls* decision as follows: "the court focused on the fact that disparate treatment based on unique, sex-based characteristics, such as the capacity to bear children, is sex discrimination prohibited by Title VII."[51]

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46. Ellen Goodman, *Benefits Must Cover Contraception*, *at* www.personalmd.com/news/n0728103836.shtml (last accessed Nov. 10, 2002).

47. *Erickson*, 141 F. Supp. 2d at 1268.

48. *Id.* at 1268.

49. *Id.* at 1272.

50. *Id.* at 1271.

51. *Id.*

Thus, the *Erickson* court concluded that "the PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant"[52] and that prescription contraception falls within its reach. In reaching its decision to grant summary judgment for the plaintiff on her disparate treatment claim,[53] the court emphasized policy considerations and the negative consequences of unplanned pregnancies.[54]

### *B. EEOC Commission Decision*

In December 2000, the Equal Employment Opportunity Commission issued a Commission Decision finding discrimination where prescription contraceptive drugs were excluded from coverage by a health plan that covered other preventive drugs.[55] The Commission reasoned that the Supreme Court made clear, through its decision in *Johnson Controls*, that the "PDA's prohibitions cover a woman's potential for pregnancy, as well as pregnancy itself."[56] The Commission then made the leap from the Supreme Court's inclusion of classifications based on one's potential for pregnancy within the protection of the PDA to the inclusion of prescription contraception within the PDA, in part because it is one means of controlling a person's ability to become pregnant.

The Commission's decision also relied on the language in the PDA that specifically excludes abortion, in most cases, from the requirement that employers cover pregnancy and related conditions on the same basis as other medical conditions.[57] The Commission concluded that, because Congress took pains to specifically exclude abortion and did not include any such exclusion for contraception, it must have intended for the PDA to apply to contraception. According to the Commission, because the employers excluded the cost of prescription contraceptive drugs—available only to women—from their employee health plan while covering a number of other preventive drugs,

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52. *Id.*

53. *Id.* The defendant-employer initially appealed the ruling. That appeal was dismissed, however, after the court approved a settlement on March 4, 2003. The agreement requires the employer to continue providing coverage for prescription contraceptive drugs and related clinical services, as was required by the district court's decision. Further, the employer must provide this coverage to those class members currently employed with no co-payment through 2006. Finally, the defendant-employer will pay $100 to those class members no longer employed by the defendant. Planned Parenthood Federation of America, *Planned Parenthood Negotiates Victory for Fairness for Women in Landmark Erickson v. Bartell Contraceptive Coverage Case*, Mar. 4, 2003, *at* http://www.plannedparenthood.org/about/pr/030304_Erickson.html.

54. *Id.* at 1273 ("Unintended pregnancies, the condition which prescription contraceptives are designed to prevent, are shockingly common in the United States and carry enormous costs and health consequences for the mother, the child, and society as a whole.").

55. U.S. Equal Employment Opportunity Commission, Commission Decision, *at* www.eeoc.gov/docs/decision-contraception.html (last modified Dec. 14, 2000).

56. *Id.*

57. *Id.*

devices, and services, the plans violated the PDA's prohibition against discrimination on the basis of pregnancy.[58]

## III. TITLE VII AS AMENDED BY THE PDA SHOULD NOT BE INTERPRETED SO BROADLY

### *A. Prescription Contraception Is Not Within the Scope of the PDA*

The PDA amended Title VII by adding the following language to Section 701:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.[59]

With the passage of the PDA Congress clarified what constitutes sex-based discrimination under Title VII.

> Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination. Section 703 of Title VII, which provides the substantive rule regarding sex-based employment discrimination, applies with equal force to employment discrimination on the basis of pregnancy.[60]

Clearly, discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. What is far from clear is whether Congress intended for contraception to fall within the PDA's realm of pregnancy, childbirth, or related medical conditions.

Examining the plain language of the amended statute, the answer to that question should be no. The Eighth Circuit Court of Appeals applied the *ejusdem*

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58. *See* U.S. Equal Employment Opportunity Commission, *EEOC Issues Decision on Two Charges Challenging the Denial of Health Insurance Coverage for Prescription Contraceptives*, *at* www.eeoc.gov/press/12-13-00.html (last modified Dec. 13, 2000).

59. 42 U.S.C. § 2000e(k).

60. Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1312 (11th Cir. 1994).

*generis* rule of statutory construction in interpreting the language of the PDA[61] in *Krauel v. Iowa Methodist Medical Center*.[62] In analyzing and rejecting the plaintiff's claim that infertility was included within the Pregnancy Discrimination Act, the *Krauel* court concluded that "'[r]elated medical conditions,' a general phrase, thus should be understood as referring to conditions related to 'pregnancy' and 'childbirth,' specific terms."[63] The *Krauel* court found that "[t]he plain language of the PDA does not suggest that related medical conditions should be extended to apply outside the context of pregnancy and childbirth. Pregnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception."[64]

Like infertility, contraception is readily distinguishable from "pregnancy," "childbirth," and "related medical conditions." Contraception is defined as "the deliberate prevention of conception."[65] Contraception, when used successfully, precludes pregnancy, just as infertility prevents pregnancy. It, too, is strikingly different than pregnancy and childbirth which occur after conception.[66] Given the absence of clear congressional intent to include it, the plain language of the Pregnancy Discrimination Act does not encompass prescription contraception.[67]

Furthermore, "pregnancy" and "childbirth" are gender specific conditions. However, both fertile men and fertile women may choose to deliberately prevent conception. And contraception, in its various forms, may be used by a male or a female. These characteristics differentiate contraception from actual pregnancy and child bearing and support a finding that contraception does not fall within the Pregnancy Discrimination Act.

In deciding that the Pregnancy Discrimination Act applies to prescription contraception, the EEOC relied, in part, upon the specific exclusion of abortion from the Act's requirements.[68] The EEOC reasoned that, if Congress wanted to specifically exclude contraception from the PDA, Congress would have specifically so stated, as it did for abortion.[69] However, this reasoning is flawed because abortion is significantly more like "pregnancy, childbirth, and related

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61. Laporta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758, 770 (W.D. Mich. 2001).

62. 95 F.3d 674 (8th Cir. 1996).

63. *Id.* at 679.

64. *Id.*

65. WEBSTER'S NINTH NEW DICTIONARY 284 (9th ed. 1983).

66. *See* Alexander v. Am. Airlines, Inc., 2002 U.S. Dist. LEXIS 7089, at *11 (N.D. Tex. Apr. 22, 2002) ("By no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition,' require the provision of contraceptives as part of the treatment for infertility.").

67. *But see Erickson*, 141 F. Supp. at 1270. The court acknowledged that "the amendment makes no reference whatsoever to prescription contraceptives," but the court decides that Congress embraced the dissenting opinion in *Gilbert* and thus requires employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same. *Id.*

68. U.S. Equal Employment Opportunity Commission, *supra* note 55.

69. *Id.*

medical conditions" than contraception. One must be pregnant before one can have an abortion. Abortion is performed on women who are actually pregnant. The two—pregnancy and abortion—are manifestly intertwined. Abortion, by its very nature, is linked to childbearing capacity which is uniquely female. It is those uniquely female biological traits that Congress sought to clearly bring within the ambit of Title VII with the passage of the Pregnancy Discrimination Act.

Contraception is different. The entire purpose of contraceptive use is to prevent pregnancy from ever occurring. It is designed to interfere with fertility and reproductive capacity. Contraception and pregnancy only become joined if the contraception fails. Because of these fundamental differences between abortion and contraception, the fact that Congress specifically excluded abortion from coverage of the PDA does not suggest congressional intent to include contraception.

Additional evidence exists to support the conclusion that Congress did not intend the inclusion of contraception within the Pregnancy Discrimination Act. On multiple occasions, Congress has considered passing the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC). Originally introduced in 1997, the EPICC would mandate prescription contraception coverage by health insurance plans that cover other prescription drugs.[70] Clearly, Congress is aware that such coverage is lacking and that there is a need to consider such legislation. Congress knows that many insurers fail to provide contraceptive coverage, finding that "the vast majority of private insurers cover prescription drugs, but many exclude coverage for prescription contraceptives."[71] Thus, it is unlikely Congress assumes they have already secured contraceptive coverage, at least for all women who work for Title VII covered employers, through the passage of the Pregnancy Discrimination Act. Therefore it seems highly improbable that there would be another *Gilbert*-type congressional response to a federal court deciding that the lack of contraception coverage does not give rise to a Title VII violation. Congressional behavior indicates it does not believe prescription contraception coverage is mandated by Title VII as amended by the Pregnancy Discrimination Act.[72]

Additional reasoning in support of the judiciary finding that prescription contraception does not fall within the ambit of the Pregnancy Discrimination Act

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70. Kaiser Daily Reproductive Health Report, *Contraceptive Coverage Debate Gaining Momentum in States, Remains Stalled at Federal Level*, Dec. 16, 2002, *at* http://www.kaisernetwork.org/daily_reports/rep_index.cfm?DR_ID=15108.

71. Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong. § 2 (1997).

72. Interestingly, federal employees have only enjoyed coverage of prescription contraceptives for approximately the past five years, long after the enactment of the PDA. Continued coverage of prescription contraceptives was in jeopardy in 2001 when President Bush omitted the provision that would provide continued insurance coverage for federal employees. Judy Mann, *Still Struggling to Secure Access to Contraception*, WASH. POST, June 20, 2001, at C12.

can be found in *EEOC v. Staten Island Savings Bank.*[73] In that case, a charge of disability discrimination in violation of the Americans with Disabilities Act (ADA) was made against an employer whose disability plan provided a lesser benefit for those suffering from a mental disability than for those suffering from a physical disability. In finding for the defendant, the court reasoned:

> The ADA, unclear on its face, does not specifically condemn the historic and nearly universal practice inherent in the insurance industry of providing different benefits for different disabilities. The interpretation of Title I urged upon us by the EEOC would require far-reaching changes in the way the insurance industry does business. Of course, Congress could require those modifications to be made, but we are reluctant to infer such a mandate for radical change absent a clearer legislative command. We agree with [other circuits] that "had Congress intended to control which coverages had to be offered by employers, it would have spoken more plainly because of the well-established marketing process to the contrary."[74]

This reasoning can be easily applied to the issue of prescription contraception.[75] Congress is aware that coverage of prescription contraceptives is lacking and, like the insurance industry's practice of providing a lesser benefit for mental disabilities than physical, if it had intended the Pregnancy Discrimination Act to eliminate that practice, it would have "spoken more plainly."[76] Congress's failure to specifically reference contraception in the text of the PDA prevents a finding of congressional intent to require otherwise comprehensive health plans to cover prescription contraception because Congress was well aware that the coverage was lacking. In the light of such knowledge, if Congress had intended for contraception to be included within the coverage of the PDA, it would have stated so explicitly.

The *Erickson* court also relied on the Supreme Court's opinion in *Johnson Controls*, in which the Court did not limit the application of the PDA to women who were actually pregnant, in reaching its conclusion that contraception is within the meaning of the PDA.[77] The fetal protection policy at issue in *Johnson Controls* differentiated between fertile males and fertile females. In that case, the Court recognized that both males and females may be fertile and have an interest in the protection of the health of their potential children.[78] Yet, it was only women who were prohibited from certain jobs when that potential to reproduce

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73. 207 F.3d 144 (2d Cir. 2000).

74. *Id.* at 149 (citations omitted).

75. Some federal courts have found that the ADA prohibits discrimination between the disabled and the non-disabled, but not between the mentally and the physically ill. *See* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000); Parker v. Metro Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997).

76. *Staten Island Sav. Bank*, 207 F.3d at 149.

77. *Erickson*, 141 F. Supp. 2d at 1271.

78. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991).

existed. It seemed to be the biological difference between men and women—the fact that the woman is the one who bears the child—on which the employer based its distinction.

Unlike the state of pregnancy or the possibility of being pregnant, which was the unlawful classification made by the fetal protection policy at issue in *Johnson Controls*, the desire to engage in sexual activity while avoiding conception is not unique to females. Although prescription contraceptives are currently only available for females,[79] contraception is not solely a "female" issue. A female acting alone has no need for contraception. Prescription birth control, only one of various conception prevention methods, is a sub-category of contraception. The fact that, due to the current limitations of medical science, there are currently no prescription contraceptives available for males does not change the nature of contraception.

In *Armstrong v. Flowers Hospital*[80] the court described *Johnson Controls*: "[i]n that case, the employer had denied women who were capable of becoming pregnant the opportunity to work in certain jobs."[81] It takes two to conceive—which is different than the actual physical state of being pregnant which is obviously a female-only, sex-based characteristic. Reproductive capacity—fertility, to use the term from *Johnson Controls*—is common to both males and females. Furthermore, there are many methods of contraception available to both women and men. In fact, thirty-eight percent of married modern contraceptive users depend on male methods of contraception.[82] Varied methods of contraception available include, but are not limited to, irreversible surgical procedures, prescription contraceptive drugs and devices, condoms, spermicides, and non-medical methods such as withdrawal and fertility awareness. Simply because one category of the varied options is currently available only for females does not make the exclusion of that category from coverage by an employer's health plan a violation of Title VII.

The desire to engage in sexual activity without conceiving drives individuals to use contraception. There is nothing inherently gender-related about this desire to prevent conception. The court, in *Piantanida v. Wyman Center, Inc.*,[83] had the opportunity to distinguish between sex-based characteristics, discrimination based on which would be unlawful in the employment context, and non-sex-based characteristics, discrimination based on which would not violate Title VII. In that case, the plaintiff, an administrative assistant, was counseled on the deficiencies in her work performance prior to the commencement of her

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79. For suggestions on how to jumpstart research and development of contraceptives see William M. Brown, *Deja Vu All over Again: The Exodus from Contraceptive Research and How to Reverse It*, 40 BRANDEIS L.J. 1 (2001).

80. 33 F.3d 1308, 1314 (11th Cir. 1994).

81. *Id.* at 1315.

82. Janet Larsen, Earth Policy Institute, *Sterilization Is World's Most Popular Contraceptive Method*, Oct. 15, 2002, *at* http://www.earth-policy.org/Updates/Update18.htm (the thirty-eight percent is split between condoms and vasectomy).

83. 116 F.3d 340 (8th Cir. 1997).

maternity leave. During the course of the plaintiff's leave of absence, the employer learned of a significant backlog in her work.[84] Thus, upon her return to work after her leave, the plaintiff was transferred to a lower level position and her salary was reduced accordingly. The plaintiff-employee quit and filed suit, alleging she was forced to resign in violation of Title VII's prohibition against sex discrimination.[85] The plaintiff's allegation of discrimination was largely based on the employer's statement "that she was being given a position for a new mom to handle."[86]

The court dismissed her action. The court found there was nothing inherently sex-related about becoming a parent—both men and women become parents. The *Piantanida* court reasoned

> an individual's choice to care for a child is not a "medical condition" related to childbirth or pregnancy . . . [a]n employer's discrimination against an employee who has accepted this parental role—reprehensible as this discrimination might be—is therefore not based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees, including men and women who will never be pregnant.[87]

Similarly, the individual's choice to use contraception is not a "medical condition" related to childbirth or pregnancy. The choice to use contraceptives is gender-neutral. The fact that one sub-category of contraception—prescription contraception—is currently only available to females does not transform one's choice to use that particular category of contraception into a gender-specific biological function like pregnancy and child-bearing. The choice to use prescription birth control is not a gender-based characteristic, which is the type of characteristic Congress sought to eradicate as a basis of discriminatory treatment with the passage of Title VII and the Pregnancy Discrimination Act.

Another federal court had the opportunity to examine the meaning of the PDA in *Pacourek v. Inland Steel Co.*[88] That court found that

> [t]he basic theory of the PDA may be simply stated: Only women can become pregnant; stereotypes based on pregnancy and related medical conditions have been a barrier to women's economic advancement; and classifications based on pregnancy related medical conditions are never gender-neutral. Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is therefore illegal discrimination. It makes sense to conclude that the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that discrimination against

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84. *Id.*
85. *Id.* at 341.
86. *Id.*
87. *Id.* at 342.
88. 858 F. Supp. 1393 (N.D. Ill. 1994).

> persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law.[89]

The focus is on the physical state of being pregnant, or the potential to be pregnant, which are uniquely female biological traits. However, again, both men and women may want to engage in sexual relations without conceiving. The fact that FDA-approved prescription contraceptives, which are but a few of the contraception options that are currently available only for women does not turn the desire to not conceive a child into a sex-based characteristic. Reproductive capacity is not uniquely female and the PDA should not be read to introduce "a completely new classification of prohibited discrimination based solely on reproductive capacity."[90]

Interpreting the PDA to not encompass contraception is consistent with *Johnson Controls*. In *Johnson Controls*, the Court recognized the distinction between fertility, which is not unique to women, and childbearing capacity, which is unique to women. Examining the defendant's fetal protection policy, the Court concluded that "[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job."[91] The distinction made by the employer in its policy, which was held to violate Title VII as amended by the PDA, was childbearing capacity, not fertility or reproductive capacity. The Court suggested a policy based on the fertility of both men and women would pass muster.[92] The use of birth control is necessitated by the fertility of the man and the woman. An individual's decision to use birth control results from the reproductive capacity of two people and is not specific to *childbearing* capacity. Hence, to find contraception outside of the PDA is consistent with *Johnson Controls*.

### *B. Exclusion Is Not Discriminatory*

The exclusion of prescription contraception from a prescription insurance plan is not discriminatory. Simply because one sub-category of contraception is available only for women does not make the exclusion of contraception from an otherwise comprehensive plan discriminatory. The use of prescription contraception for birth control is voluntary and not medically necessary.[93] Prescription birth control prevents not a disease, but a normal function of the human body. This distinction differentiates prescription contraception from prescription drugs in general and is a valid, non-discriminatory reason for its exclusion. Furthermore, males and females are arguably equally burdened by such an exclusion.

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89. *Id.* at 1401.

90. Saks v. Franklin Covey Co., 316 F.3d 337, 345 (2d Cir. 2003).

91. Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 197 (1991).

92. *Id.*

93. Some women may be prescribed birth control for reasons other than contraception. This Note is limited to the issue of the use of prescription birth control for contraceptive purposes.

Discrimination is the differential treatment of persons "when no reasonable distinction can be found between those favored and those not favored."[94] Yet there is no true point of comparison for a court to conclude that there is unlawful differential treatment based on the failure of an otherwise comprehensive medical plan to cover prescription contraception. "If the underlying category is contraception, then the exclusion of prescription drugs for birth control is discriminatory only if the contraceptives that men use are covered."[95] The plans under attack do not cover prescription contraception for men or women so there is no discrimination. Due to the limitations of medicine, there are not yet any FDA-approved prescription contraceptives available for males.[96] Surgical sterilization, the most popular form of birth control[97] and a type of contraception that is available for both men and women, is often covered by insurance plans for both men and women.[98] Many contraceptive choices do not require professional medical consultation or treatment of any kind and generally fall outside the ambit of insurance coverage altogether.[99]

Plaintiffs urge the point of comparison is prescription drugs generally: the fact that a medical plan does provide coverage for prescription drugs yet fails to cover prescription contraception gives rise to a violation of Title VII. But can prescription contraception fairly be compared to other prescription drugs? The *Erickson* court noted that the insurance plan at issue covered preventive drugs such as blood pressure and cholesterol-lowering drugs, and drugs to prevent

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94. BLACK'S LAW DICTIONARY 479 (7th ed. 1999).

95. Peter Neurath, *Contraception Controversy Swirls Around Definition*, PUGET SOUND BUS. J., Aug. 3, 2001, *at* http://seattle.bizjournals.com/seattle/stories/2001/08/06/ focus9.html.

96. The availability of a male prescription contraceptive method would resolve the issue by providing a clear choice for comparing the comprehensiveness of coverage between females and males. When asked if male contraceptives were in development, Andrea Tone, the author of a book on the history of contraception, responded in the affirmative. Offering very little detail, she indicated clinical trials were being conducted with male hormonal contraceptive methods. Laura Fording, *A Crash Course on Contraception*, NEWSWEEK, June 22, 2001. Nonetheless, reports predict "it will take at least five years and . . . many studies before a male birth control drug hits the market." Amanda Ripley, *At Last, the Pill for Men*, TIME, Oct. 20, 2003. *See also* Dr. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457 (1997) (describing the various developments in contraceptive research, including prescription methods for males).

97. Patricia Guthrie, *Healthy Living: More Choices; New Birth Control Options Include an Alternative to Sterilization*, ATLANTA J. & CONST., Nov. 12, 2002, at 1E.

98. *See* Eileen L. McDonagh, *My Body, My Consent, Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 n.69 (1999) ("Voluntary sterilization is the most effective and popular method of birth control.").

99. There has been support for making the birth control pill available over-the-counter as well. *See* Cheryl terHorst, *Some Seek Broader Horizons for "Morning-After Pill,"* CHI. TRIB., Oct. 11, 2000, at 1C ("The Food and Drug Administration held hearings this summer about the possibility of making various prescription medications available over the counter, including the birth control pill.").

blood clotting and breast cancer.[100] Should the fact that an employer's health plan covers prescription drugs to prevent blood clotting compel coverage of birth control pills in order to be lawful? While there is no doubt that unintended pregnancies are a serious problem, there are differences between pregnancy and the diseases and illnesses those other prescription drugs are designed to prevent.[101] Furthermore, there are effective methods of non-prescription drug contraception available for both males and females.

Some point to Viagra® as the appropriate comparison.[102] The argument is that plans that cover male-only drugs such as Viagra®, yet fail to cover female-only drugs like prescription contraceptives, are discriminating against women.[103] However, plaintiffs are proceeding with discrimination cases against employers whose plans also exclude treatments and services for impotence from coverage.[104]

Contraception is voluntary and not medically necessary,[105] which differentiates it from other covered prescriptions. Therefore, it is submitted that the proper level of categorization for comparison between the coverage afforded males and females under the health plans is contraceptives, not prescriptions in general. It is logical to evaluate a health plan's equity and lawfulness, not based on the general category of *prescription* coverage, but on the category of *contraception* coverage. Therefore, the exclusion is not discriminatory unless prescription contraceptives for males are covered. Using this level of analysis, the plans are not discriminatory because they do not cover prescription contraceptives for males or females.

In the face of ever-increasing health care costs[106] employers cannot begin to cover everything.[107] Cost is not a defense to otherwise discriminatory

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100. *Erickson*, 141 F. Supp. 2d at 1268.

101. *But see id.* at 1272. The employer's argument that contraception was distinguishable from other prescription drugs did not convince that court that any such difference was relevant.

102. *See* Kim H. Finley, *Life, Liberty, and the Pursuit of Viagra? Demand for "Lifestyle" Drugs Raises Legal and Public Policy Issues*, 28 CAP. U. L. REV. 837 (2000).

103. However, Viagra® can also arguably be distinguished from prescription contraception as it does treat the medical problem of erectile dysfunction.

104. *See* Mauldin v. Wal-Mart Stores, Inc., 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Apr. 23, 2002). The Plan of defendant-employer Wal-Mart excludes from coverage "charges for, or relating to, any treatment or service for abortions, sexual dysfunction, impotence, infertility, birth control (birth control pills/injectives are not covered for any reason), sterilization or reversal of sterilization procedures, artificial insemination, in-vitro fertilizations or embryo transfers, and any complications arising therefrom." *Id.* at *3 n.1.

105. This Note does not address the applicability of Title VII to the exclusion of prescription birth control when prescribed for reasons other than birth control.

106. *See* Associated Press, *Costs of Health Benefits Are Seen Rising by 15%*, N.Y. TIMES, Oct. 15, 2002, at C7; Beth Kobliner, *Personal Business Health Plans Are Offering Fewer Choices and Higher Costs*, N.Y. TIMES, Oct. 6, 2002, at 37; Delia M. Rios, *No Longer an Entitlement: Health Care, Long Seen as a Routine Benefit, Is Under Fire as Employers Seek Relief from Endlessly Rising Insurance Premiums*, CHI. TRIB., Feb. 2, 2003, at C5.

107. When did we begin to expect our employers to cover *all* of our medical expenses anyway?

actions,[108] but the exclusion of a voluntary prescription drug that does not prevent illness is not discriminatory, even when that prescription is currently available only for one gender. Additionally, the over-the-counter options available effectively serve the same purpose. For example, with perfect use of the male condom, two out of one hundred women will experience pregnancy during their first year of use.[109] Furthermore, for those using the health of women as an argument in favor of finding the exclusion of prescription contraception within the scope of Title VII,[110] note that condoms are the form of birth control that offers the highest level of protection from sexually transmitted diseases.[111] According to the Centers for Disease Control and Prevention, male latex condoms

> when used consistently and correctly, are highly effective in preventing transmission of HIV, the virus that causes AIDS. In addition, correct and consistent use of latex condoms can reduce the risk of other sexually transmitted diseases (STDs), including discharge and genital ulcer diseases. While the effect of condoms in preventing human papillomavirus (HPV) infection is unknown, condom use has been associated with a lower rate of cervical cancer, an HPV-associated disease.[112]

The exclusion of prescription contraception from coverage burdens both males and females. In fact, both males and females have initiated legal action challenging plans that exclude prescription contraception.[113] This phenomenon may be traced to the Supreme Court's decision in *Newport News*.[114] In that case, the Court made clear that the coverage offered to the dependents of employees must be taken into consideration in evaluating claims of discrimination,

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*See* Rios, *supra* note 106 (providing a brief history of how "health-care benefits [came] to be considered a right.").

108. *See* City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 716, 717 (1978) ("That [cost] argument might prevail if Title VII contained a cost-justification defense . . . [b]ut neither Congress nor the courts have recognized such a defense under Title VII.").

109. Planned Parenthood Federation of America, *Birth Control*, *at* http://www.plannedparenthood.org/bc/condom.htm#Benefits (last accessed Nov. 12, 2003). However, the effectiveness rate of hormonal methods of birth control, the category that includes the birth control pill and other prescription contraception methods, is higher. With perfect use of the pill, less than one woman out of one hundred will experience pregnancy during her first year of use. *See* Engender Health, *Contraceptive Method Effectiveness*, *at* http://www.engenderhealth.org/wh/fp/ceff.html (last accessed Nov. 12, 2003).

110. *See* Law, *supra* note 19.

111. Planned Parenthood Federation of America, *supra* note 109 (The latex condom offers better protection against sexually transmitted infections (STI) than any other birth control method.).

112. Centers for Disease Control and Prevention, *Male Latex Condoms and Sexually Transmitted Disease*, *at* http://www.cdc.gov/nchstp/od/latex.htm (last accessed Nov. 12, 2003).

113. EEOC v. United Parcel Serv., Inc., 141 F. Supp. 2d 1216 (D. Minn. 2001).

114. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

reasoning that "since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."[115]

The male plaintiff in *EEOC v. United Parcel Service, Inc.* challenged the lawfulness of his employer's plan because the plan failed to provide prescription coverage for his wife's oral contraceptive.[116] In that instance, the contraceptive was prescribed for the treatment of his wife's hormonal disorder.[117] The employer-defendant's motion to dismiss was denied.[118] Thus, the exclusion of prescription contraception may expose the employer to liability to both female and male employees on the basis of sex discrimination. This illustrates the fact that the exclusion disadvantages both genders. Under this sweeping interpretation of Title VII, both a male and a female could be burdened by the same health plan and both have an actionable sex discrimination claim.[119] Under some circumstances, this may be reasonable to effectuate the purposes of Title VII as amended by the Pregnancy Discrimination Act. However, unlike longer expected life spans[120] and actual pregnancy, the desire to engage in sexual activity yet prevent conception is prevalent among both males and females—it is not a female characteristic. Thus, exclusion of prescription contraception from a health plan burdens both genders. Couples who choose prescription contraception as their birth control method will have to cover the expense out of pocket.

The area of insurance coverage for fertility treatments gives rise to analogous issues and the analysis of the federal courts on that subject is instructive. The court in *Saks v. Franklin Covey Co.*[121] confronted the issue of the lawfulness of an employer's insurance plan that, while providing coverage for a variety of infertility procedures, specifically excluded "surgical impregnation procedures, including artificial insemination, in-vitro fertilization or embryo and fetal implants."[122]

The plaintiff argued that the failure of the plan to cover surgical impregnation procedures was a violation of Title VII because surgical

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115. *Id.* at 684.

116. 141 F. Supp. 2d at 1216.

117. *Id.*

118. *Id.*

119. The implication of *Newport News* is indeed that a discriminatory plan may be actionable by both genders. However, the plan at issue in *Newport News* afforded less comprehensive protection to married male employees than the protection it afforded to married female employees. Specifically, the plan provided female employees more extensive pregnancy-related benefits than those provided to the spouses of male employees. *Newport News*, 462 U.S. at 669.

120. The classification of employees based on their average life spans as a class which resulted in requiring females to make larger contributions to a pension fund was adjudged unlawful in *Manhart*. 435 U.S. 702, 706 (1978).

121. 316 F.3d 337 (2d Cir. 2003).

122. *Id.* at 341.

impregnation procedures are performed only on women. While acknowledging that the exclusion of procedures performed exclusively on women may, in certain circumstances, constitute discrimination, the court found that the exclusion in this plan was not contrary to Title VII.[123] The *Saks* court reached the conclusion that the failure of an employer's otherwise comprehensive plan to cover procedures that are performed exclusively on one gender was not discriminatory in this case because the exclusion equally disadvantaged both male and female employees.[124] The court reasoned that "[a]lthough the surgical procedures are performed only on women, the need for the procedures may be traced to male, female, or couple infertility with equal frequency."[125] Thus, the plan did not violate Title VII.

The same reasoning can be applied to the coverage of prescription contraception. Although the sub-category of contraception at issue here—prescription contraception—is available only for women, the need for contraception can be traced to male and female fertility with equal frequency.[126] The intended function of surgical impregnation and prescription birth control both relate to the reproductive capacity of women—one to produce pregnancy and one to prevent pregnancy. The role of the male is essential and obvious in both situations; without him, there is no possibility of pregnancy. The exclusion of prescription contraception equally disadvantages males and females.

Acknowledging the decision of the EEOC, which found the exclusion of birth control from an otherwise comprehensive healthcare plan to be a violation of Title VII, the *Saks* court made a cursory distinction between the exclusion of oral contraceptives and the exclusion of surgical impregnation.[127] The court stated that the exclusion of oral contraceptives disadvantaged women only and distinguished the issue before it stating, "the exclusion of surgical impregnation techniques limits the coverage available to infertile men and infertile women and thus does not violate Title VII."[128] This perfunctory reasoning is unconvincing, especially in light of the persuasive reasoning the court employed in holding the exclusion of surgical impregnation by the defendant's health plan to be lawful.[129] The exclusion of oral contraceptives from a health plan limits the coverage available to fertile men and fertile women just like the exclusions faced by infertile men and infertile women covered by the health plan at issue in *Saks*.

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123. *Id.* at 347.

124. *Id.* at 346.

125. *Id.* at 347.

126. The *Saks* court found that "[i]nfertility is a medical condition that afflicts men and women with equal frequency." *Id.* at 346. From this I draw the conclusion that men and women must therefore be fertile with equal frequency.

127. *Id.* at 337.

128. *Id.* at 348.

129. *But see* Joanna Grossman, *If Employers Don't Provide Insurance Covering Infertility, Are They Guilty of Sex Discrimination?*, Jan. 28, 2003, *at* http://writ.corporate.findlaw.com/grossman/20030128.html (presenting the argument that the *Saks* court reached the wrong result on the issue of whether the exclusion constituted sex discrimination).

The fact that one contraceptive technique, prescription birth control, is only currently available for women parallels the fact that surgical impregnation is available only for women.[130] That fact does not transform the exclusion of either prescription contraception or surgical impregnation into a violation of Title VII because both sexes are burdened by the exclusion.

The Eighth Circuit also had the opportunity to address the question of whether a medical benefit plan violated Title VII due to its exclusion of infertility treatments in *Krauel v. Iowa Methodist Medical Center*.[131] The plaintiff had received treatment for her infertility, including artificial insemination and gamete intrafallopian tube transfer (GIFT). The plaintiff successfully conceived through one of the three GIFT treatments.[132] While her employer's health plan covered the plaintiff's pregnancy and delivery expenses, the plan denied her request for coverage of her infertility treatments. She initiated legal action alleging violations of Title VII, the PDA, and the Americans with Disabilities Act.[133] The court affirmed the district court's holding of summary judgment in favor of the defendant on all of the claims. The court reasoned that "[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant. In this case, because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral, *Johnson Controls* is inapposite."[134]

This reasoning of the *Krauel* court offers additional support for the conclusion that exclusion of contraception from an otherwise comprehensive health plan is not a violation of Title VII as amended by the Pregnancy Discrimination Act. That court also emphasized the distinction between actual pregnancy and infertility.[135] The distinction between fertility and pregnancy, or potential pregnancy, is equally as valid and determinative.

All employees who select prescription contraceptives as their contraception of choice - as opposed to the over the counter, surgical or other contraceptive options - have to foot the bill.[136] This includes female employees and male employees whose spouses opt for prescription birth control. Thus, like the exclusions at issue in the *Krauel* case, the exclusion of prescription birth control is gender neutral and does not constitute a violation of Title VII.

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130. Furthermore, one can envision the creation of prescription birth control for men well before one can envision the surgical impregnation of a male. Surgical impregnation is arguably more sex-linked than prescription birth control.

131. 95 F.3d 674 (8th Cir. 1996).

132. *Id.* at 676.

133. *Id.* at 675.

134. *Id.* at 680.

135. *Id.* at 679.

136. *See* Sharona Hoffman, *AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance*, 23 CARDOZO L. REV. 1315, 1351 (examining the decision of the *Erickson* court, the article states "Furthermore, at least arguably, the denial of coverage affects men and women equally, since the woman and her partner must choose an alternate form of birth control or perhaps pay for the pill out of pocket.").

Employers should be able to make non-discriminatory exclusions from their health plans, and the exclusion of prescription birth control is such a non-discriminatory exclusion. While advocates of coverage argue that employers cover other preventive treatments, they fail to acknowledge that, unlike contraception that prevents pregnancy, those other preventive treatments prevent disease. As one opponent of mandated coverage stated, "Pregnancy is not a disease and interventions to stop the healthy functioning of healthy women's reproductive systems are not basic health care."[137] Title VII, as amended by the PDA, does not require the employer to provide preferential treatment to any individuals. Instead, "[t]itle VII requires employers to treat employees who are members of protected classes the same as other similarly situated employees, but it does not create substantive rights to preferential treatment."[138]

The fact that prescription birth control is available only for women does not compel employers to provide coverage or risk violation of Title VII. The statute does not require preferential treatment. The purpose of birth control is related to reproductive capacity, not childbearing capacity. Thus, it is not a uniquely female concern, but instead an important issue for both males and females.

### *C. A Dangerously Slippery Slope*

There are strong policy reasons for advocating the coverage of prescription birth control[139] by otherwise comprehensive health plans. These reasons will be explored in Part IV. However, these reasons do not justify a sweeping interpretation of Title VII to compel that coverage. The judiciary is not the appropriate mechanism for mandating coverage. If governmental intervention is deemed necessary and prudent to secure coverage for prescription contraceptives, it should initiate from the legislature.

State legislatures are actively considering the issue. More than sixty contraceptive coverage bills were introduced in 2002 in at least nineteen states.[140] And while state bills have repeatedly stalled, Congress has also considered legislation at the federal level that requires insurers to provide increased coverage of contraceptives.[141] Clearly, legislators throughout the nation are aware of the gap in coverage and are intervening to mandate contraceptive coverage as they, and the voters who elect them, deem appropriate.

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137. Rankin, *supra* note 9 (quoting Gail Quinn, the executive director of the U.S. Conference of Catholic Bishops).

138. Lang v. Star-Herald, 107 F.3d 1308, 1312 (8th Cir. 1997).

139. *See infra* Part IV.

140. Kaiser Daily Reproductive Health Report, *supra* note 70.

141. The Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC) was introduced in 1997, 1999, and 2001. The EPICC Act would prohibit "health insurance plans that provide prescription drugs, devices, and outpatient services from excluding coverage of FDA-approved prescription contraceptive drugs and devices . . . and related outpatient contraceptive services." Center for Reproductive Rights, *Contraceptive Coverage for All: EPICC Act Is Prescription for Women's Equality*, Sept. 2002, *at* http://www.crlp.org/pub_fac_epicc.html.

For the courts to stretch Title VII to effectuate what they may believe is sound policy will result in ramifications far beyond the popular and sympathetic issue of contraception.[142] While it certainly may seem "right" for an employer to provide coverage for prescription contraception as part of an otherwise comprehensive health plan, for the courts to interpret Title VII in a manner to compel employers to provide the coverage has consequences beyond the issue of contraception.

Granted, employers arguing that the cost of covering contraception, when contraception alone is considered, will bankrupt them may not be overly convincing. One may reason that the cost of pregnancy would surely cost the employer far more than the cost of covering contraception.[143] When one considers only the additional cost associated with the inclusion of prescription contraceptives within an otherwise comprehensive plan, the cost defense indeed may be mildly persuasive at best. However, it seems unlikely in today's litigious society that the lawsuits will stop with the issue of contraception after the theory is proven successful. Once the courts endorse such a sweeping interpretation of the statute, where will the courts be able to draw the line? Successful claims will open the flood gates for claims based on similar theories; exclusion of treatments for infertility,[144] impotence, and other risks that exclusively or disproportionately impact a particular gender may be deemed discriminatory in violation of Title VII. If this happens, the threat to the continued viability of many employers' health plans is very real.[145]

Men could make a like case against employers whose plans exclude prescriptions for erectile dysfunction.[146] The benefit plan of the defendant-

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142. *See generally* Planned Parenthood Federation of America, *Cover My Pills; Fair Access to Contraception*, *at* http://www.covermypills.com/facts/factsheet.asp (last accessed Mar. 2, 2003) (stating that contraceptive coverage is popular among health care consumers).

143. Geraldine Sealey, *Who Pays for the Pill?*, *at* http://abcnews.go.com/sections/us/DailyNews/birthcontrol020619.html (quoting the executive director of Planned Parenthood "[Covering contraception] saves so much on the other end. Over the long term, contraception coverage seems to save money.") (last accessed Mar. 4, 2003).

144. Some courts have already held that the exclusion of infertility treatments is not a violation of Title VII. *E.g.*, Saks v. Franklin Covey Co., 316 F.3d 337 (2d Cir. 2003); Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996). However, if the reasoning of the *Erickson* court is embraced it seems infertility treatments, such as surgical impregnation, may be difficult to distinguish from prescription birth control. The *Saks* court made a somewhat superficial distinction between infertility treatments performed only on women and prescription birth control. *See supra* notes 121-28 and accompanying text. The *Erickson* court also acknowledges the issue of infertility treatment coverage stating that "The Court need not determine whether the exclusion of infertility drugs discriminates against women and simply notes that at least two courts have found that such an exclusion is not discriminatory." *Erickson*, 141 F. Supp. 2d at 1275 n.14.

145. *See*, Editorial, *We All Stand to Lose*, INDIANAPOLIS STAR, July 21, 2000, at 22A. *See also* Sealey, *supra* note 143.

146. *See* Neurath, *supra* note 95 (questioning whether insurers would violate the regulation if it failed to cover prescription drug benefits for use by men only). Note a California appeals court

employer in *Erickson* actually did exclude coverage for Viagra®, a popular drug used to treat erectile dysfunction. Although relegated by the court to a footnote, the *Erickson* court did acknowledge the possibility of male employees having a viable cause of action against Bartell for sex discrimination in violation of Title VII because of this exclusion. The court stated, "Assuming Bartell is correct and its prescription benefit plan does not cover Viagra[®] even when prescribed for the medical condition of impotency, such an exclusion may later be determined to violate male employees' rights under Title VII. This issue is not before the Court."[147]

Similarly, the Wal-Mart health plan, which is currently the subject of judicial scrutiny,[148] also contains exclusions - in addition to the exclusion of prescription birth control - which may expose it to additional litigation. Wal-Mart's plan also excludes coverage for drugs used as treatment for infertility and impotence.[149] A lawyer with the National Women's Law Center, which is supporting the plaintiffs' case against the giant retailer, argues that the plan at issue does provide coverage for blood pressure and cholesterol medication. "If you're covering other prescription drugs and not covering contraceptive prescriptions, then you're discriminating on the basis of gender."[150] If courts accept this logic, how can Wal-Mart continue to exclude impotence drugs? Impotence, or erectile dysfunction, drugs are prescribed exclusively for males. Males are just as entitled to protection under Title VII's prohibition of gender-based discrimination as females.[151] Thus, under this approach, an employer that provides coverage for other prescription drugs, yet excludes drugs for the treatment of impotence coverage, is discriminating on the basis of gender. The exclusion of infertility treatments available only to females, or those infertility treatments available only for males, would also be in violation of federal law if courts look only at the gender of the person prescribed the drug or receiving the treatment. For the courts that adopt the reasoning of the EEOC and *Erickson*, it will be a challenge to identify well-reasoned distinctions to reach a different conclusion.

The possibilities are especially alarming because of the startling rates at which health care costs are already rising. The increased costs are the subject of

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recently affirmed the decision that an HMO could not be forced to cover erectile dysfunction drugs. This ruling may be at odds with the reasoning employed by the *Erickson* court and the EEOC. Lisa Rapaport, *Ruling May Limit HMO Coverage of "Lifestyle Drugs,"* SAN DIEGO UNION-TRIB., June 28, 2002, at A4 (describing the ruling of a California Court of Appeals allowing Health Maintenance Organizations to limit coverage for sexual dysfunction drugs, including Viagra®).

147. *Erickson*, 141 F. Supp. 2d at 1275 n.12.

148. Maudlin v. Wal-Mart Stores, Inc., 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Apr. 23, 2002).

149. Rankin, *supra* note 9.

150. *Id.*

151. *See* Mills v. Health Care Serv. Corp., 171 F.3d 450, 454 (7th Cir. 1999) ("[I]t is well settled law that the protections of Title VII are not limited to members of historically discriminated-against groups."); *see also* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

headlines across the country.[152] Escalating costs already pose a very real threat to the viability of existing plans. In 2002, the number of small employers, defined as those employing three to 199 workers, offering health coverage dropped to sixty-one percent from sixty-seven percent in 2000.

Even goliath corporations such as General Electric (GE) are feeling the pressure. Fourteen thousand GE workers went on strike in mid-January 2003 in response to GE's decision to increase insurance co-payments.[153] Related to that issue, Jeffrey Immelt, chairman of General Electric, commented that increased health care costs for 2003 would eat away all of GE Consumer Products' profits if the company continued to bear the brunt of the increases.[154] Responding to questions about the future of GE's Consumer Products Division, located in Louisville, Immelt commented that GE would remain in Louisville provided that he believed it was profitable to do so.[155]

The threat of finding health plans discriminatory based on the exclusion of drugs or treatments is far from confined to the issue of contraception. Employers' arguments that the increased cost associated with requiring additional coverage will compromise their ability to provide affordable coverage may not seem compelling[156] to those who artificially limit it to the issue of contraception. However, the true assessment of the argument's strength must be made based on the much broader ramifications that may result. The risk of employers significantly increasing the employees' cost or dropping employee health coverage completely seems much more tangible when one considers the whole picture. Health care costs are dramatically increasing as it is.[157] Employer arguments that mandating benefits increases the cost of providing coverage so much that it may force employers to drop coverage should not be readily dismissed.

### *D. If It Is to Be, Limit Relief*

If the interpretation of Title VII as amended by the PDA adopted by the *Erickson* court and the EEOC gains widespread acceptance, it should be applied prospectively. The conclusion that the failure to cover prescription contraception violates the federal statute is a new and unforeseeable expansion of the law.

As recently as 1972, only six years before the 1978 passage of the PDA,

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152. *See supra* note 20.

153. Rios, *supra* note 106.

154. Mark Yost, *GE Remains Committed to Louisville*, THE COURIER-JOURNAL, Jan. 28, 2003, at 1F.

155. *Id.*

156. *But see* Sealey, *supra* note 143 ("Forcing employers and insurers to cover birth control will only exacerbate high health insurance costs.").

157. *See supra* note 20; *see also* Darrin Schlegel, *Strategies Evolving to Tame Plan Costs*, HOUSTON CHRON., Jan. 26, 2003, at B1 (quoting a health management expert, "Employers simply can not afford to continue to absorb these rate hikes.").

some state statutes criminalized the distribution of contraceptive devices.[158] In 1972, the Supreme Court decided *Eisenstadt v Baird.* In that case, a Massachusetts statute prohibiting the distribution of contraceptive devices to unmarried persons was found to be unconstitutional.[159] Given this historical background, is it reasonable to assume that employers should have known that the PDA encompassed contraception? The leap from striking down statutes that prohibit the distribution of contraception to compelling employers to provide insurance coverage for it is a tremendous one. There is no reason for employers to believe their otherwise comprehensive health care plan is unlawful because it does not provide for contraceptive coverage. Because employers reasonably believed the exclusion was lawful, any relief granted based on a decision to the contrary should be limited to prospective relief.

The Pregnancy Discrimination Act itself had a postponed effective date as to existing fringe benefit and insurance programs. When enacted, the Pregnancy Discrimination Act of 1978 read in part, "The provisions of the amendment made by the first section of this Act shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act."[160] If the PDA is suddenly interpreted to encompass the coverage of prescription contraceptives twenty-five years after its passage, employers should be compelled only to provide prospective relief.

Such limitations on relief for Title VII violations are not without precedent. In *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*,[161] the Supreme Court acknowledged that the defendant employer reasonably assumed its pension plan was lawful. Thus, the Court's decision that the plan violated Title VII was applied prospectively, with the benefits derived from contributions made prior to the decision being calculated as provided by the existing terms of the existing plans. The Court recognized that retroactive application would have a devastating result financially on employers.

The expense associated with the retroactive application of the reasoning adopted by the *Erickson* court may be similarly unjustifiably injurious to employers. According to the attorney representing the plaintiff suing her employer, CVS, because its prescription plan does not cover contraceptives, "CVS could be required to pay as much as $38 million in back damages."[162]

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158. Eisenstadt v. Baird, 405 U.S. 438 (1972). The Massachusetts statute at issue in *Eisenstadt* made it a crime to sell, lend, or give away any contraceptive drug, medicine, instrument, or article, except that physicians were permitted to administer or prescribe contraceptive drugs or articles for married persons, and pharmacists were permitted to fill prescriptions for contraceptive drugs or articles for married persons.

159. *Id.*

160. 42 U.S.C. § 2000e(k) (1994).

161. 463 U.S. 1073 (1983) (holding that the employer's retirement plan that paid lower monthly retirement benefits to women on average live longer that men discriminated on the basis of sex in violation of Title VII).

162. Cynthia L. Cooper, *Women Fight for Insurance Equity in Court, at Work*, WOMEN'S

Similarly, the plaintiffs challenging Wal-Mart's health plan are seeking reimbursement for all employees who paid for their own prescription contraceptives during the past two years.[163] Such a result seems inappropriate where the employer reasonably believed its plan was lawful.[164]

## IV. PROVIDING THE COVERAGE MAKES SENSE

Whether Title VII is inapposite to an employer's exclusion of prescription contraception from its otherwise comprehensive plan or not, it makes sense for employers to provide the coverage as part of an otherwise comprehensive health plan. For many employers, the decision has already been made for them. Many states have already mandated coverage through legislation.[165] Twenty states currently require employer health care plans to cover prescription contraception on the same level as they cover other prescription drugs.[166] Even absent legislative or judicial mandates, providing coverage is a wise decision.

About half the pregnancies in this country are unintended.[167] For over three million women, or nearly sixty percent of all women who become pregnant each year in the United States, pregnancy is an unplanned occurrence in their lives.[168]

> Women faced with unplanned pregnancies are more likely to ignore the early signs of pregnancy and less likely to receive adequate prenatal care; their infants, therefore, run an increased risk of low birth weight and infant mortality. For some families, the emotional and economic stress of an unplanned child is overwhelming. Children who are unplanned are more likely to be abused, and children born unwanted face increased risks of poor health, poverty, and neglect.[169]

Increasing the availability and affordability of contraceptives can help reduce this

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ENEWS, Oct. 20, 2002, *at* http://www.womensenews.org/article.cfm?aid=957.

163. Julie Appleby, *Worker Sues Wal-Mart for Cost of Contraceptives*, USA TODAY, Oct. 17, 2001, at 2B.

164. Furthermore, calculating what that amount should be presents complications. Wal-Mart may have increased premiums, co-pays, or deductibles in order to share some of the additional cost with enrolled employees.

165. *See supra* note 22. For an examination of the constitutionality of these state mandates under the Federal Constitution's Free Exercise Clause see Inimai M. Chettiar, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867 (2002).

166. Rita Rubin, *Battle Over Contraceptive Coverage Heats Up*, USA TODAY, May 8, 2002, at 8D.

167. Cheryl terHorst, *Law Group Takes Aim at Insurers' Snub of the Pill*, CHI. TRIB., Nov. 6, 2002, at C3.

168. Equity in Prescription Insurance and Contraceptive Coverage Act of 1997, H.R. 2174, 105th Cong. § 2 (1997).

169. NARAL Pro-Choice Foundation, *Contraception*, *at* http://www.naral.org/issues/contraception.html, (last accessed Mar. 4, 2003).

nation's high rate of unplanned pregnancies.[170] Although the number of women who are covered by private health insurance and become pregnant because their pills are not covered by their health insurance may not comprise a significant portion of those unintended pregnancies,[171] providing the coverage is a step in the right direction. Some question the number of unintended pregnancies that can truly be linked to a private health insurer's failure to cover prescription contraception; more precisely, the number of women covered by a private health insurance plan who unintentionally become pregnant due to that plan's lack of coverage for prescription contraception must be insignificant. Nevertheless, providing the coverage is surely a step in the right direction.

The United States has alarmingly high infant mortality and low birth-weight rates, which are both are associated with unintended conception.[172] Women who experience unintended pregnancies are less likely than other women to receive adequate prenatal care, resulting in greater risks to their health and poorer birth outcomes.[173]

The additional expense to employers would be negligible. Providing full contraceptive coverage in employment-based health care plans would cost employers only $21.40 per employee per year. For employers with plans that currently provide no contraceptive coverage, the average cost of adding it—if employers contributed 80 percent of the cost—would be $17.12 per year.[174]

Finally, Americans support the idea of a nationwide contraceptive coverage mandate. A 1998 survey of one thousand U.S. adults revealed nearly eight out of ten support mandatory contraceptive coverage, even if it meant their monthly health insurance costs would rise.[175] Seventy-three percent of privately insured adults support full contraceptive coverage in their health insurance plans, even if it would increase their costs by five dollars per month, according to a

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170. *Id. See* Irving Harris, *A Clue to Chicago's High Murder Rate You May Not Suspect*, CHI. TRIB., Apr. 16, 2002, at N19 (providing a brief exploration of the link between reduction in unplanned births and the reduction in crime rates). Others question whether the availability of birth control will reduce the number of unplanned pregnancies. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 138 (3d ed. 1986).

> The ready availability of contraceptive methods may not significantly reduce the number of unwanted children that are born. Contraception reduces the expected costs of sex and hence increases the incidence of sex; the fraction of unwanted births is thus smaller but the number of sexual encounters, by which the fraction must be multiplied to yield the *number* of unwanted births, is larger.

*Id.*

171. *See* Ira Carnahan, *Who Pays for the Pill?; the Bogus Crusade Against Sex Discrimination in Health Insurance*, WKLY. STANDARD, Oct. 2, 2000, at 20.

172. Planned Parenthood Federation of America, *supra* note 142.

173. *Id.*

174. Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage for Contraception*, 1 THE GUTTMACHER REPORT (Aug. 1998), *at* http://www.agi-usa.org/pubs/journals/gr010405.html (last accessed Mar. 1, 2003).

175. NARAL Pro-Choice America Foundation, *supra* note 2.

nationwide poll conducted by the Kaiser Family Foundation.[176]

## CONCLUSION

Access to safe, effective contraception has undoubtedly changed the lives of both women and men. Yet unintended pregnancy remains a problem in this country. One barrier to consistent use of contraception is its cost. Many believe that insurers should bear that cost when coverage for other prescription drugs and devices is provided. Because prescription contraception is currently only available for females, some argue that the exclusion of prescription contraception from coverage is discriminatory in violation of Title VII, as amended by the Pregnancy Discrimination Act. However, the appropriate level of comparison to assess parity between the coverage afforded males and females should be contraception, not prescriptions in general. Because those insurers do not provide coverage for prescription male contraception, the exclusion is not discriminatory. Through the passage of Title VII and the PDA, Congress sought to eradicate discrimination on the basis of sex and inherent, sex-based characteristics. The fact that prescription contraception is currently available only for females does not transform it or its coverage by private insurance plans into such an inherent, sex-based characteristic. Furthermore, contraception is used to prevent conception, which is traced to the fertility of both a man and a woman. Thus, the exclusion of prescription contraception, which is but one category of effective contraception, burdens both males and female. There are strong policy reasons for employers to provide the coverage within their otherwise comprehensive health plans. However, if the gap in coverage persists and popular sentiment demands coverage, it is the role of the legislature to mandate the coverage. Legislative action to compel coverage can be limited to the specific issue of contraception. However, courts interpreting Title VII to require coverage may open the flood gates to charges of discrimination based on the exclusion of other categories of drugs. This would present a real threat to the continued viability of employer health plans, which are already facing dramatic cost increases.

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176. Planned Parenthood Federation of America, *supra* note 142.

# QUESTIONING THE REQUIREMENT FOR WRITTEN DESCRIPTION: *ENZO BIOCHEM V. GEN-PROBE* AND OVERLY BROAD PATENT CASES

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## INTRODUCTION

Imagine the following patent claim: "An isolated protein capable of inhibiting beta-amyloid." Assume that the patent explains that beta-amyloid is the protein responsible for plaques in the brain associated with Alzheimer's disease and that inhibition of beta-amyloid may be therapeutically useful to treat, cure, or prevent Alzheimer's disease. The patent relates that the physical and chemical structures of beta-amyloid are well known, and it explicitly describes the beta-amyloid molecule and a method for identifying inhibitors of the molecule. Additionally, the patent explains that proteins in general have been extensively studied such that it is an advanced field of biochemistry. Accordingly, proteins can be characterized by numerous methodologies in the art, and the basic structure of proteins—the primary, secondary, tertiary, and in some cases, quaternary structure—can be readily determined by the skilled artisan. Given that disclosure, a person of ordinary skill might hypothesize generally about the types of proteins that would inhibit beta-amyloid, but the full scope of which proteins are encompassed by this claim would be difficult, if not impossible, to comprehend. The scope could encompass literally billions of proteins. Should the inventor on this patent, who discovered the method of identifying inhibitors of beta-amyloid *but did not disclose any proteins that inhibit beta-amyloid*, be granted exclusive rights to all proteins discovered to have this property?

To allow a patent claim of such broad scope would be inconsistent with the goals of patent law. The scope of the claim is not commensurate with the inventor's contribution to the field of Alzheimer's research. He discovered how to identify proteins that inhibit beta-amyloid; claims to his method may be patentable by him. Additionally, any proteins that he can characterize by structure or partial structure correlated with function may be patentable by him. Nonetheless, this inventor has not conceived of all possible proteins that may inhibit beta-amyloid. Because the patent system provides exclusivity to inventors for a specific period, allowing him such a broad scope would exclude other researchers who are investigating potential treatments, cures, and preventive methods for Alzheimer's disease using proteins to inhibit beta-amyloid. Exclusivity would limit research to this inventor, his licensees, and parties willing to risk an infringement suit later. This limitation could be disastrous for Alzheimer's research.

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Despite the possible ruinous results, claims that are nearly as broad, such as "[a]n isolated antibody capable of binding to Antigen X,"[1] are being advocated by the United States Patent and Trademark Office (USPTO), and more recently by the U.S. Court of Appeals for the Federal Circuit, as complying with current patent law.[2] Lawsuits are being litigated over patents in which the inventor was granted a claim with very broad scope, but the inventor did not produce even a single composition. For example, in *University of Rochester v. G.D. Searle & Co.*,[3] the U.S. District Court for the Western District of New York granted a motion for summary judgment of patent invalidity for failure to meet the written description requirement of 35 U.S.C. § 112, first paragraph.[4] The invalid patent claimed "a pharmaceutical 'method for selectively inhibiting PGHS-2 activity in a human host' in which 'the activity of PGHS-1 is not inhibited,'" but the inventors produced no compositions.[5] The court held that the patent could not be practiced until a composition was invented for use in the method.[6] Thus, the inventors did not possess the complete invention, and the patent failed to meet the written description requirement. Permitting such a broad claim is not in accordance with public policy relating to patent exclusivity. Instead, it frustrates the practice of patent law by confusing inventors and practitioners regarding the requirements for obtaining a patent, particularly the written description requirement.

This Note discusses recent cases dealing with written description law, particularly with respect to biotechnology,[7] and the associated rise of discord among judges in the U.S. Court of Appeals for the Federal Circuit. Recent questions concerning changes in written description law are addressed by

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1. *See Synopsis of Application of Written Description Guidelines*, at 59-60, *available at* http://www.uspto.gov/web/menu/written.pdf (last visited Oct. 22, 2003) [hereinafter *Synopsis of Application*].

2. *See* Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 964 (Fed. Cir. 2002).

3. 249 F. Supp. 2d 216 (W.D.N.Y. 2003).

4. 35 U.S.C. § 112 para. 1 (2000). Citations to the written description requirement vary widely. For consistency, all references to the statute in the text of this Note are stated as "§ 112, first paragraph," and in the footnotes as "35 U.S.C. § 112, para. 1" or in short form as "§ 112, para. 1." The abbreviation "para. 1" is used rather than "¶ 1" or "(1)" because the "authority is organized in part by indented paragraphs not introduced by paragraph symbols . . ." or by numbered paragraphs. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 37 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). Exceptions to these citations in this Note occur when the statute is cited otherwise in a quote or in a title; in those situations, the citation is not revised.

5. *Univ. of Rochester*, 249 F. Supp. 2d at 219-20. *Cf. Ariad Announces Filing of Lawsuit Against Eli Lilly Alleging Infringement of Pioneering NF-KB Treatment-Method Patent*, *at* http://media.corporate-ir.net/media_files/nsd/aria/releases/062502-2.pdf. This case was filed in the U.S. District Court for the District of Massachusetts on June 25, 2002 and is awaiting trial at the date of this Note.

6. *Univ. of Rochester*, 249 F. Supp. 2d at 218.

7. "Biotechnology," "biotechnical," and "biotechnological" are commonly abbreviated as "biotech" and will hereinafter be referred to as such.

analyzing *Enzo Biochem, Inc. v. Gen-Probe, Inc.*,[8] a series of cases from 2002. The second decision in the *Enzo* series, *Enzo* II, signifies an inflection point in the court's concurrence on the use of a discrete written description requirement, separate from enablement. Suddenly, patent practitioners are uncertain how to meet the written description requirement.[9] Furthermore, this question is not likely to be resolved in the near future. The court denied *en banc* review,[10] and Enzo Biochem and Gen-Probe settled the remanded case out of court, providing no resolution to the outstanding questions in the case. In the meantime, attorneys and agents continue to file patent applications, merely guessing at what the written description requirements will be and hoping to meet the standard to protect their clients' rights. This Note addresses the far-reaching implications that these changes will have on patent practice and the biotech industry in general.

## I. BRIEF INTRODUCTION TO BIOTECHNOLOGY AND BIOTECH PATENTS

### *A. The Importance of Biotech Patents*

The biotech field is a rapidly growing area of the pharmaceutical industry, the fruits of which may cure some of today's worst diseases. Yet, drug development costs money. It is estimated that the average cost to develop a drug is near $900 million.[11] Thus, biotech drugs share one common need—the need for economic protection in the form of patent rights. Patent protection provides exclusive rights, thereby enticing investors by assuring legal protection for their investment. The prospects of legal protection and possible profit stimulates investment in the industry, leading to industrial growth, which in turn yields larger quantities and improved quality of biotech drugs. Better drugs improve the quality of life for people who take them, which is the ultimate goal of every pharmaceutical company.

Patent protection in biotechnology has been controversial. Critics believe that no one should have exclusive rights to the essential proteins needed for life,

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8. References to the *Enzo Biochem, Inc. v. Gen-Probe, Inc.* line of cases and the related court decisions will hereinafter be referred to generically as *Enzo*, or specifically as *Enzo* I or *Enzo* II for the April 2, 2002 case (opinion at 285 F.3d 1013 (Fed. Cir. 2002)) and the July 15, 2002 case (opinion at 323 F.3d 956 (Fed. Cir. 2002)), respectively. The company, Enzo Biochem, Inc., will hereinafter be referred to as Enzo Biochem.

9. *See, e.g.*, Edward R. Ergenzinger Jr. & W. Murray Spruill, *First Get the Patent: Quirks of Biotech Innovation and Innovators Complicate Securing of Rights*, LEGAL TIMES, Nov. 4, 2002; Robert C. Scheinfeld & Parker H. Bagley, Enzo Biochem: *What Direction is Written Description Taking?* N.Y. L.J., Sept. 25, 2002.

10. Enzo Biochem, Inc. v. Gen-Probe, Inc., 63 U.S.P.Q.2d 1618, 1618 (Fed. Cir. 2002).

11. *Price Tag for New Drugs Almost $900 Million*, AM. ASS'N OF PHARMACEUTICAL SCIENTISTS NEWSMAGAZINE, July 2003, at 8, *available at* http://www.aaps.org/publications/newsmagazine/2003/jul03/08.pdf.

such as insulin or human growth hormone.[12] However, biotech patent protection has been quite beneficial for the field and for society in general. It has led to tremendous growth and scientific breakthroughs over the past two decades, yielding life-saving drugs like Humulin® (human insulin) and Epogen® (erythropoietin). This growth arises from public disclosure of the invention. Patent exclusivity is a quid pro quo; the patent owner must disclose his invention to the public so that others may build upon the technology, modify it, or use the invention once the patent has expired. Over time, the technology advances to higher levels.

Nevertheless, one cannot obtain a patent for something he merely wishes to invent. Specific criteria must be met to demonstrate that the inventor has conceived of the invention and has, at least conceptually, reduced it to practice. Namely, the inventor must possess, or at least be able to describe, a working embodiment of his invention, proving that his "invention" is not just a research plan. Title 35 of the United States Code governs the patentability of inventions. Specifically, § 112, first paragraph, states, in relevant part, that "[t]he specification shall contain a written description of the invention . . . ."[13] Yet, controversy arises over how to meet the written description requirement,[14] especially in the biotech area.

Written description in the biotech area has developed through a relatively small number of cases. Over time, the Federal Circuit has attempted to progressively define the requirement such that patent protection is neither too narrow nor overly broad. Narrow protection diminishes incentives for investment by allowing potential infringers to easily modify the invention by designing around the claims to obtain their own patents, thereby diminishing the value of a patent. On the other hand, overly broad patent protection retards the development of new technology by granting protection to future developments of existing technology. This would give the owner exclusivity over too much property, arguably more than he has actually conceived.[15] This would hinder growth in the industry as the patent owner could "hold out" for excessive licensing fees and cut off entire areas of research.

Consider the beta-amyloid claim previously discussed.[16] That inventor will effectively be the only scientist researching proteins that inhibit beta-amyloid. Other possible researchers would avoid the field for fear of a future infringement suit; the large investment required for drug discovery would make the risk of a lawsuit too costly. Nonetheless, the patent owner may not have the resources to perform extensive research. In essence, he has narrowly limited the field of

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12. *See generally* James Bradshaw, *Gene Patent Policy: Does Issuing Gene Patents Accord with the Purposes of the U.S. Patent System?*, 37 WILLAMETTE L. REV. 637, 646-53 (2001) (describing various theories for precluding genetic information from patentability).

13. 35 U.S.C. § 112 para. 1 (2000).

14. *Conflicts in Federal Circuit Patent Law Decisions*, 11 FED. CIR. B.J. 723, 734 (Pasquale A. Razzano ed.) (2002) [hereinafter *Conflicts*].

15. *See, e.g.*, Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473 (Fed. Cir. 1998).

16. *See* introductory discussion *supra*.

Alzheimer's research, perhaps without even producing a therapeutic product to help patients with the disease. This example illustrates the importance of allowing claims that are commensurate with the scope of the invention, rather than overly broad claims. By construing the written description requirement to provide a moderate scope of protection, the court is serving the goal of § 112, first paragraph, and promoting advancement in the technology as well as growth in the biotech industry.

### *B. Biotech Terminology*

As a scientific discipline, biotechnology and discussions thereof require understanding of key concepts relating to the field, such as complementarity and hybridization.[17] DNA typically occurs as a double-stranded molecule, meaning that one strand of DNA binds to another strand. DNA consists of combinations of four nucleotides: adenine (A), cytosine (C), guanine (G), and thymine (T). Binding occurs between the nucleotides of the two strands. In order to bind, a nucleotide in one strand must be "complementary" to a nucleotide in the other strand.[18] Adenine and thymine are complementary (*viz.*, A binds T); cytosine and guanine are complementary (*viz.*, C binds G).[19]

The process of joining two complementary single strands of DNA is known as "hybridization."[20] Hybridization will occur if the DNA strands are complementary.[21] As DNA are often large molecules, some portions of the two strands may not be complementary, while other portions are. For example, assume that two strands of DNA have twenty contiguous nucleotides of the following complementarity: the first ten nucleotides are complementary, the next five nucleotides are not complementary, and the last five nucleotides are complementary. In that case, the strands may bind together loosely, but small environmental changes may break the strands apart. Fundamentally, the more complementary the strands are, the more stringent the hybridization will be, and the more difficult it will be to break the strands apart.[22] Thus, if the sequence of a strand of DNA is known, and stringent hybridization occurs with another strand, one can infer that the two strands are complementary to some degree. Nonetheless, it may be difficult to determine the exact degree of complementarity and precisely which nucleotides in the strands are not complementary, unless one knows the sequence of the second strand.

To search for DNA strands that contain a certain sequence or function, scientists often use nucleotide probes that will hybridize stringently to the

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17. For a primer in basic principles of molecular biology and biotechnology, *see generally* BRUCE ALBERTS ET AL., MOLECULAR BIOLOGY OF THE CELL (3d ed. 1994) and JAMES DARNELL ET AL., MOLECULAR CELL BIOLOGY (2d ed. 1990).

18. DARNELL ET AL., *supra* note 17, at 88-89.

19. *Id.*

20. ALBERTS ET AL., *supra* note 17, at G-12.

21. *Id.* at 300.

22. *Id.* at 306.

DNA.[23] The probes are designed to be complementary to a portion of the desired DNA. For example, assume that a scientist knows the sequence of a small portion (fragment) of a certain DNA of interest to him. Further, assume that the fragment consists of the sequence "ATGCAG," but the entire DNA is much larger and has not yet been sequenced. The scientist can prepare a fully complementary probe with the sequence "TACGTC" and add it to a cell suspected to contain the DNA of interest. The probe will search for the DNA with the complementary portion and hybridize to it. A dye or other identifying label added to the probe will enable the scientist to readily identify it after it hybridizes to the desired DNA. He can then recover both the probe and the DNA hybridized to it.[24] Next, the scientist can break the bonds between the probe and the retrieved strand, and sequence the entire DNA strand obtained. Note, however, that even though the probe hybridizes to the DNA strand, probes are usually small sequences of DNA that only bind a portion of the large DNA strand retrieved.[25] Stringent hybridization to this small portion of the retrieved DNA tells the scientist nothing about the remaining portion of the DNA sequence.

Another key area of importance to biotech deals with antibodies. An increasing number of antibodies are being developed and used as therapeutic drugs to treat disorders such as colorectal cancer, breast cancer, and organ transplant rejection.[26] An antibody is a protein produced naturally by white blood cells in response to a foreign molecule or invading organism, such as a bacterium, that could harm the invaded cell. To protect the cell from harm, the antibody tightly binds to the invading organism or molecule, known as an antigen, and either inactivates it or causes it to be destroyed.[27] To avoid destroying or inactivating the wrong thing, antibodies can distinguish between similarly structured molecules.[28] The antigen specifically binds to a small region of the antibody. The remainder of the antibody is not involved in antigen binding.[29]

The structure of antibodies has been studied extensively.[30] As a protein, an antibody consists of a contiguous sequence of amino acids. This sequence is composed of two regions: a constant region and a variable region. The constant region occurs in one of only a few different biochemical forms, but the variable region may occur in a virtually infinite number of forms. This variability provides an array of antibodies that can bind to an equally large number of

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23. *Id.* at G-19.

24. *Id.* at 300.

25. *Id.*

26. Rathin C. Das, *Proteins and Antibodies Make Advances as Therapeutic Products*, AM. CLINICAL LABORATORY, June 2001, at 12-14.

27. ALBERTS ET AL., *supra* note 17, at G-2.

28. DARNELL ET AL., *supra* note 17, at 65.

29. *Id.* at 1004-06.

30. CHARLES A. JANEWAY, JR. ET AL., IMMUNOBIOLOGY 16 (Sarah Gibbs et al. eds., 5th ed. 2001).

antigens.[31] Thus, the sequence of the variable region of any particular antibody differs from the variable region of any other antibody.[32]

The variable region of the antibody is the portion that binds to the antigen. However, unlike complementarity in DNA in which A binds to T and C binds to G, this level of complementarity does not exist between specific amino acids. Generally, antibodies and antigens bind together based on their shapes and attractions between the chemical structures.[33] This results in unpredictability of the antibody sequence. One cannot know the exact sequence of the variable region of an antibody simply by identifying the antigen that it binds.

Moreover, different antibodies bind to different locations on an antigen.[34] For example, assume the antigen is a protein that consists of twenty amino acids. One antibody may bind to the first ten amino acids of the antigen sequence, and a completely different antibody may bind to the next ten. Additionally, antibodies may exist that bind to amino acids number two through eleven, number three through twelve, and so on. Even more, some antibodies may bind to ten amino acids of the antigen, while others only bind to five amino acids of the antigen. The variability, and hence the unpredictability, is immense.[35]

## II. DEVELOPMENT OF THE WRITTEN DESCRIPTION REQUIREMENT

The written description requirement is one of several requirements that a patent disclosure must include to be valid. This requirement, along with two others, the enablement and best mode requirements, is specifically stated in 35 U.S.C. § 112, first paragraph:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.[36]

Because this area of patent law has changed little from the Patent Act of 1793,[37] the annals are devoid of legislative history on the topic. Sufficient

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31. *Id.*

32. *Id.* at 100.

33. Such attractions include electrostatic forces, hydrogen bonding, Van der Waals forces, and hydrophobic forces. *Id.* at 101-04.

34. *Id.* at 100-01.

35. *Id.* at 124.

36. 35 U.S.C. § 112 para. 1 (2000).

37. Act of Feb. 21, 1793, ch. 11, § 3, 1 Stat. 318, 321. Subsequent Patent Acts include: Act of July 4, 1836, ch. 357, § 6, 5 Stat. 117, Act of July 8, 1870, ch. 230, § 26, 16 Stat. 198, 201, and Act of July 19, 1952, ch. 950, § 1, 66 Stat. 792 (codified as amended at 35 U.S.C. §§ 1-376 (2000)). *See* Mark J. Stewart, *Written Description Requirement of 35 U.S.C. § 112(1): The Standard After* Regents of the University of California v. Eli Lilly & Co., 32 IND. L. REV. 537, 538

written description of an invention has been required in case law from at least the early nineteenth century.[38] Nonetheless, many commentators have associated modern jurisprudence on the subject with the 1967 case *In re Ruschig*,[39] which explicated that the written description is a distinct requirement for patentability.[40] Since then, this statute has been construed repeatedly in the case law from the U.S. Court of Appeals for the Federal Circuit, yet it remains an unsettled area of law, especially in the context of biotech inventions.[41]

Methods used for determining whether a patent application complies with the written description requirement vary in the case law. Opinions differ with respect to the degree to which an invention must be described. The two extremes of the description continuum can be illustrated by the cases *Lockwood v. American Airlines, Inc.*[42] and *Hyatt v. Boone*.[43] *Lockwood* represents a rigid test for compliance with the written description requirement, requiring express disclosure of all claim elements by explicit description in the patent application.[44] On the other end of the spectrum, *Hyatt* represents a relaxed written description requirement, allowing the requirement to be met by less than express disclosure if the applicant can show that a skilled artisan reading the application would have necessarily comprehended and understood the missing description.[45]

Biotech cases fall between the two extremes. As a result of the degeneracy of the genetic code,[46] a narrow claim to DNA may be easily "designed around." If the patent were restricted to the exact DNA actually reduced to practice, a subsequent inventor could change a small portion of the biomolecule and still achieve the same biological activity without infringing the patent. To protect biotech inventors from this occurrence, claimed biomolecules may be generically described, providing a group or "genus" of biomolecules which fall within the scope of the patent. In this situation, requiring a rigid description of all elements of the claimed biomolecules would not provide adequate protection to the patentee, without listing thousands or perhaps millions of possible variations. In consideration of this, the USPTO and courts may allow patentees to claim

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(1999).

38. *See, e.g.*, Evans v. Eaton, 20 U.S. 356 (1822).

39. *See, e.g.*, Moba, B.V. v. Diamond Automation, Inc., 325 F.3d 1306, 1319 (Fed. Cir. 2003); Enzo Biochem, Inc. v. Gen-Probe Inc., 63 U.S.P.Q.2d 1618, 1623-24 (Fed. Cir. 2002); Mark. D. Janis, *On Courts Herding Cats: Contending with the "Written Description" Requirement*, 2 WASH. U. J.L. & POL'Y 55, 59 (2000); Janice M. Mueller, *The Evolving Application of the Written Description Requirement to Biotechnological Inventions*, 13 BERKELEY TECH. L.J. 615, 616-17 (1998).

40. 379 F.2d 990, 995 (C.C.P.A. 1967).

41. *Conflicts*, *supra* note 14, at 734.

42. 107 F.3d 1565 (Fed. Cir. 1997).

43. 146 F.3d 1348 (Fed. Cir. 1998).

44. 107 F.3d at 1572.

45. 146 F.3d at 1354-55.

46. The exact sequence of a biomolecule may vary from species to species, or even among the same species, yet provide the same biological activity.

sequences within a specific homology, variants, mutants, fragments, subsequences, and the like, if enough examples are provided to sufficiently describe the genus being claimed.[47]

The liberal "skill of the art" written description requirement of *Hyatt* is not typically allowed in biotech patents. The patentee cannot presume that the skilled artisan would necessarily know that fragments or conservative substitutions are allowed. Instead, he must describe the claimed genus with some specificity.[48] For example, the application should define how many amino acids are required to constitute a "fragment." Assume a protein has fifty amino acids. Will a fragment of ten amino acids function the same way? Will five contiguous amino acids suffice? The application should describe what length of fragment retains functionality. Moreover, which nucleotides can be substituted at specific positions in the generic sequence to qualify as a "variant"? The application should list the possible amino acids that can be substituted and still achieve the same biological activity. Such a description is a compromise between *Lockwood* and *Hyatt*: the scope of the claims may be so large that it is not feasible to explicitly describe all possible biomolecules that fall within the scope, but by specifying which substitutions or fragments are allowed, the skilled artisan can envision the scope of the claimed invention.

Another conflict regarding the written description requirement is whether the enablement requirement and the written description requirement, both from § 112, first paragraph, are separate requirements that must be fulfilled by the patentee. In the 1991 case *Vas-Cath, Inc. v. Mahurkar*,[49] the court clarified this unresolved question by asserting:

> 35 U.S.C. § 112, first paragraph, requires a "written description of the invention" which is separate and distinct from the enablement requirement. The purpose of the "written description" requirement is broader than to merely explain how to "make and use"; the applicant must also convey with reasonable clarity to those skilled in the art that, as of the filing date sought, he or she was in possession *of the invention*.[50]

Clearly and succinctly, the *Vas-Cath* court established the distinction between the two requirements, seeming to resolve the issue.[51]

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47. *See, e.g.*, *Synopsis of Application*, *supra* note 1, at 20-35, 41-47.

48. Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1568 (Fed. Cir. 1997).

49. 935 F.2d 1555 (Fed. Cir. 1991).

50. *Id.* at 1563-64.

51. Debate still remains over this issue. *See, e.g.*, Enzo Biochem, Inc. v. Gen-Probe, Inc., 63 U.S.P.Q.2d 1618, 1622-33 (Fed. Cir. 2002). Many commentators feel that the written description requirement, especially in the field of biotechnology, is merely a heightened form of the enablement requirement—"super-enablement." Moba, B.V. v. Diamond Automation, Inc., 325 F.3d, 1306, 1325 (Fed. Cir. 2003) (quoting Arti Rai, *Intellectual Property Rights in Biotechnology: Addressing New Technology*, 34 WAKE FOREST L. REV. 827, 834-35 (1999) and Mueller, *supra* note 39, at 617).

Moreover, *Vas-Cath* explained that although an *exact* description of the claimed subject matter is not required for compliance, "the description must clearly allow persons of ordinary skill in the art to recognize that [the applicant] invented what is claimed"[52] and that "compliance with the 'written description' requirement of § 112 is a question of fact, to be reviewed under the clearly erroneous standard."[53] Although *Vas-Cath* did not involve biotechnology, the *Vas-Cath* court set a clear standard to be relied upon and expounded upon in future written description requirement cases.

Prior to *Enzo*, three landmark biotechnology cases shaped written description law: *Amgen, Inc. v. Chugai Pharmaceutical Co.*,[54] *Fiers v. Revel*,[55] and *Regents of the University of California v. Eli Lilly & Co.*[56] The first of these three cases, *Amgen, Inc. v. Chugai*, was a patent infringement case.[57] Amgen, Inc. sued Chugai Pharmaceutical Co. and Genetics Institute, Inc. (GI) for infringement of Amgen's patent claiming the DNA sequence encoding human erythropoietin (EPO), a therapeutic protein used to treat anemia. GI asserted an affirmative defense of patent invalidity under 35 U.S.C. § 102(g),[58] alleging that it conceived the DNA sequence prior to Amgen's conception. By 1981, GI had isolated and purified the protein EPO and conceived a "probing strategy" to isolate the gene, which it successfully reduced to practice in 1984.[59] In 1983, Amgen cloned the gene encoding EPO, thereby obtaining the structure.

The *Amgen* court held that conception was not achieved until reduction to practice occurred. "Conception is the 'formation in the mind of the inventor, of a definite and permanent idea of the complete and operative invention, as it is hereafter to be applied in practice.'"[60] "Conception requires both the idea of the invention's structure and possession of an operative method of making it."[61] Although GI alleged to have conceived in 1981, the inventor could not define the

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52. *Vas-Cath, Inc.*, 935 F.2d at 1563 (quoting *In re* Gosteli, 872 F.2d 1008, 1012 (Fed. Cir. 1989)).

53. *Id.*

54. 927 F.2d 1200 (Fed. Cir. 1991).

55. 984 F.2d 1164 (Fed. Cir. 1993).

56. 119 F.3d 1559 (Fed. Cir. 1997).

57. 927 F.2d at 1202.

58. 35 U.S.C. § 102(g) (2000). Section 102(g) provides in relevant part that:

> A person shall be entitled to a patent unless—
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> (g) before the applicant's invention thereof the invention was made . . . by another who had not abandoned, suppressed, or concealed it. In determining priority of invention there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to the conception by the other.

*Id.*

59. *Amgen*, 927 F.2d at 1205-06.

60. *Id.* at 1206 (quoting Hybritech, Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1376 (Fed. Cir. 1986), *cert. denied*, 480 U.S. 947 (1987)).

61. *Id.* at 1206.

DNA "so as to distinguish it from other materials" until 1984.[62] In 1981, GI could only describe the DNA by its principal biological property, i.e., encoding human EPO, which was "simply a wish to know the identity of any material with that biological property."[63] Description merely by biological property was not sufficient to meet the requirement for conception.[64] Conception is closely related to written description because, to prove conception, an inventor has to prove by contemporaneous documentation that he had "a mental picture of the structure" or could define it by its distinguishing characteristics, but not solely by function.[65]

The second landmark biotech case of the trilogy, *Fiers v. Revel*, was a three-way interference proceeding—three separate inventors filed patent applications on the same DNA, the DNA encoding human fibroblast beta-interferon (β-IF).[66] As the patent system of the United States is a "first to invent" system,[67] the *Fiers* court had to determine which of the three inventors was first to invent β-IF—that is, which inventor had "priority."[68] One criterion used by the court was conception.

The *Fiers* court stressed that "conception of a DNA . . . requires a definition of that substance other than by its functional utility."[69] The court related conception to written description, stating, "If a conception of a DNA requires a precise definition, such as by structure, formula, chemical name, or physical properties, as we have held, then a description also requires that degree of specificity. To paraphrase the Board, one cannot describe what one has not conceived."[70]

Looking at the descriptions of β-IF in the three patent applications of *Fiers*, the court found that only one application contained a description of the DNA itself.[71] That application set forth the "complete and correct nucleotide sequence," thereby demonstrating that the inventor was in possession of the DNA as of the application filing date.[72] Consequently, only the application with the complete DNA sequence met the written description requirement and was patentable.

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. 984 F.2d 1164, 1166 (Fed. Cir. 1993).

67. 35 U.S.C. § 102(g) (2000).

68. To establish priority in an interference, Inventor A must show that he was first to conceive of the invention and reduce it to practice by actual or constructive reduction to practice (e.g., filing a patent application). Alternatively, if he were first to conceive but last to reduce to practice, he must show that he was diligent from a time just prior to the time that Inventor B conceived of the invention until the time that Inventor A reduced it to practice. *See id.*

69. *Fiers*, 984 F.2d at 1169.

70. *Id.* at 1171.

71. *Id.* at 1172.

72. *Id.*

The third landmark biotech case, *Regents of the University of California v. Eli Lilly & Co.*, was a patent infringement case.[73] The University of California (UC) obtained a patent claiming cDNA[74] encoding vertebrate insulin. To describe vertebrate insulin, the patent contained the amino acid sequence of human insulin, already known in the art, and a constructive example of a method that could be used to obtain human cDNA. Unlike the inventors in *Amgen* and *Fiers*, UC had actually isolated, cloned, and characterized the rat insulin cDNA. However, the patent contained no sequence or structural information regarding which nucleotides constitute human insulin cDNA.[75]

UC sued Eli Lilly and Company (Lilly), alleging that Lilly infringed its patent by manufacturing and selling human insulin. Lilly responded that it did not infringe the patent, and that the patent was invalid for failure to meet the written description requirement of § 112, first paragraph.[76] Judge Lourie, writing for the majority, agreed with Lilly. Reiterating the essence of *Fiers*, he explained that providing an enabling disclosure of how one could obtain a biomolecule does not necessarily provide a written description of that biomolecule.[77] Judge Lourie then elaborated on the use of generic statements to describe a genus:

> In claims to genetic material, however, a generic statement such as "vertebrate insulin cDNA" or "mammalian insulin cDNA," without more, is not an adequate written description of the genus because it does not distinguish the claimed genus from others, except by function. It does not specifically define any of the genes that fall within its definition. It does not define any structural features commonly possessed by members of the genus that distinguish them from others. One skilled in the art therefore cannot, as one can do with a fully described genus, visualize or recognize the identity of the members of the genus. A definition by function . . . does not suffice to define the genus because it is only an indication of what the gene does, rather than what it is. It is only a definition of a useful result rather than a definition of what achieves that result.[78]

Thus, describing only the rat gene did not adequately describe a genus that encompassed the human gene.

Furthermore, the court used an obviousness analysis to show UC's lack of written description for the human cDNA. The mere fact that a description makes a claimed invention obvious does not necessarily mean that the same description satisfies the written description requirement.[79] In the cases *In re Deuel* and *In re Bell*, the court held that a claim to a specific DNA was not obvious merely

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73. 119 F.3d 1559, 1559 (Fed. Cir. 1997).
74. "cDNA" is a form of DNA.
75. *Lilly*, 119 F.3d at 1566-67.
76. *Id.* at 1562.
77. *Id.* at 1567.
78. *Id.* at 1568 (citations omitted).
79. *Id.* at 1567.

because the sequence of the encoded protein and a method for generating the DNA were known.[80] Accordingly, knowledge of the human insulin protein sequence and a method for generating the cDNA did not make human insulin cDNA obvious. Moreover, a description that did not render the human cDNA obvious also did not adequately describe the human cDNA under § 112, first paragraph.[81]

UC's "description" of human insulin added nothing new to the art: (1) the human insulin protein sequence was known;[82] (2) the method for generating the cDNA was known; and (3) the mere words "human insulin cDNA" were known. The sequence of human insulin cDNA was unknown and remained unknown after UC filed its patent application. Hence, the court held that UC did not satisfy the written description requirement for human insulin cDNA and was indeed invalid.[83]

After *Lilly*, the USPTO promulgated "Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, 'Written Description' Requirement."[84] The Guidelines are intended to assist USPTO personnel in the examination of patent applications for compliance with the written description requirement.[85] Along with the Guidelines, the USPTO published training materials for patent examiners that include biotech examples such as antibody and hybridization disclosures.[86] Each example provides a fact pattern, at least one putative claim, an analysis describing how to determine whether each claim meets the written description requirement, and a conclusion explaining whether the claim is adequately described.[87] Application of the training materials will be discussed in more detail in Part IV of this Note.

## III. THE *ENZO* CASES

### *A. Background and Procedural History*

Enzo Biochem is the assignee of U.S. Patent 4,900,659 (the '659 patent).[88] The purpose of the invention is to find compositions of matter that are useful in screening for the bacteria causing the disease gonorrhea, *Neisseria gonorrhoeae* (*N. gonorrhoeae*). Prior to this invention, the bacteria that causes meningitis, *Neisseria meningitidis* (*N. meningitidis*), interfered with the gonorrhea screening

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80. *In re* Deuel, 51 F.3d 1552, 1558 (Fed. Cir. 1995); *In re* Bell, 991 F.2d 781, 785 (Fed. Cir. 1993).

81. *Lilly*, 119 F.3d at 1567.

82. Stewart, *supra* note 37, at 553.

83. *Lilly*, 119 F.3d at 1575.

84. Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099 (Jan. 5, 2001).

85. *Id.* at 1104.

86. *Synopsis of Application*, *supra* note 1.

87. *Id.*

88. U.S. Patent No. 4,900,659 (issued Feb. 13, 1990).

process, yielding false positives. Enzo Biochem's patent resolved this interference problem.[89]

The '659 patent claims compositions of matter comprising nucleotide sequences which preferentially hybridize to *N. gonorrhoeae* over *N. meningitidis* at a ratio of greater than five to one.[90] Another claim specifically lists the American Type Culture Collection (ATCC)[91] accession numbers of three specific probes[92] that yield a ratio greater than about fifty.[93] It further claims "discrete nucleotide subsequences"[94] of the deposited probes, mutations of the probes and subsequences of the mutations, and mixtures thereof.[95]

Enzo Biochem sued Gen-Probe and several other defendants for infringement of the '659 patent.[96] The defendants moved for summary judgment, alleging that the claims were invalid for failure to meet the written description requirement of § 112, first paragraph. The district court granted the defendants' motion, stating that the claimed compositions of matter were defined only by biological activity or function (*viz.*, hybridization).[97] Enzo Biochem appealed.[98]

### *B.* Enzo *I*

The Court of Appeals for the Federal Circuit heard the appeal. Judge Lourie, the author of numerous other cases involved in the evolution of the written description requirement,[99] authored the opinion, decided on April 2, 2002. In

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89. *Id.* at cols. 2-3.

90. *Id.* at Claims 1-3, col. 27, l. 29 to col. 28, l. 30.

91. ATCC is a public depository commonly used for long-term storage of biological samples. The depository effectively serves as a public biotech "bank." It is recognized by most patent offices worldwide as an approved facility for the deposit of biological samples claimed in patents. A patentee deposits a sample of an invention in a depository so that the sample is obtainable by the public. Each sample is given its own unique identifier, known as an accession number, used to reference the stored material. *See generally Patent Depository*, ATCC Services, *at* http://www.atcc.org/Services/PatentDep.cfm (last visited Oct. 22, 2003)(describing features, fees, and means for depositing biological materials).

92. U.S. Patent No. 4,900,659 (issued Feb. 13, 1990), Claim 4, col. 28, ll. 31-49.

93. *Id.* at col. 13, ll. 9-13.

94. The '659 patent does not define subsequences, but it does define "discrete nucleotide sequences" as "a nucleotide sequence greater than about 12 nucleotides" in length. *Id.* at col. 3, ll. 26-29.

95. *Id.* at Claim 4, col. 28, ll. 31-49.

96. Enzo Biochem, Inc. v. Gen-Probe, Inc., 285 F.3d 1013, 1016 (Fed. Cir.), *vacated*, 323 F.3d 956 (Fed. Cir. 2002).

97. *Id.* at 1016.

98. *Id.* (describing Enzo Biochem, Inc. v. Gen-Probe Inc., No. 99-CV-4548, transcript of hearing at 28, 42 (S.D.N.Y. Jan. 24, 2001)).

99. *E.g.*, Judge Lourie also authored the following: Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559 (Fed. Cir. 1997); Lockwood v. Am. Airlines, 107 F.3d 1565 (Fed. Cir. 1997); *In re* Deuel, 51 F.3d 1552 (Fed. Cir. 1995); *In re* Bell, 991 F.2d 781 (Fed. Cir. 1993); Fiers v.

accordance with other written description cases of recent years, the *Enzo* I opinion continued to require a stringent written description, rejecting biological function *alone* as adequate written description. The court affirmed the summary judgment motion granted by the district court in favor of the defendants, holding:

> [T]he claimed nucleotide sequence is described only by its binding to *N. gonorrhoeae* in a preferential ratio of "greater than about five" with respect to *N. meningitidis*. While that description of the ability of the claimed probe to bind to *N. gonorrhoeae* may describe the probe's function, it does not describe the probe itself.[100]

The court rejected Enzo Biochem's argument that hybridization is a chemical property, which *Fiers* lists as a "precise definition" that meets the written description requirement.[101] When Enzo Biochem argued that binding affinity satisfies the requirements of the Written Description Guidelines,[102] the court responded that: 1) the Guidelines are not binding on the court, and 2) the Guidelines do not "set[] forth a rule that a description of a compound by its binding affinity is sufficient to satisfy § 112, ¶ 1."[103] Instead, functional characteristics, such as binding affinity, meet the Guidelines' requirements "when coupled with a known or disclosed correlation between function and structure."[104] Enzo Biochem did not assert such a correlation.[105]

Furthermore, the court rejected Enzo Biochem's argument that reducing the invention to practice and depositing the nucleotide sequences met the "possession" test of *Vas-Cath*, clarifying that possession alone does not always meet the written description requirement.[106] Reemphasizing the statutory written description requirement, the court stated that if the specification does not contain a written description, "despite a showing of possession, the specification does not adequately describe the claimed invention."[107] The claimed nucleotide sequences of the '659 patent were not so unusual that the inventors could not have described them. Consequently, the deposit did not meet the written description requirement.[108]

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Revel, 984 F.2d 1164 (Fed. Cir. 1993); Amgen, Inc. v. Chugai Pharm. Co., 927 F.2d 1200 (Fed. Cir. 1991).

100. *Enzo*, 285 F.3d at 1018.

101. *Id.*

102. Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099, 1099-1111 (Jan. 5, 2001).

103. *Enzo*, 285 F.3d at 1018-19.

104. *Id.* at 1019 (citing Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099, 1106 (Jan. 5, 2001)).

105. *Id.*

106. *Id.* at 1020.

107. *Id.* at 1021.

108. *Id.* at 1022-23.

### *C. Rehearing and Vacating of* Enzo *I:* Enzo *II*

Enzo Biochem petitioned for rehearing of the case *en banc*.[109] The court denied the *en banc* request[110] but granted a rehearing of the case by the original three-judge panel.[111] Again, Judge Lourie wrote the opinion, which vacated the earlier holding and remanded the case to the district court for factual determination of whether compositions, which were not specifically deposited, satisfy the written description requirement.[112]

The court's analysis began by stressing that not all functional descriptions fail to meet the written description requirement.[113] Referencing the USPTO Guidelines[114] and the Synopsis of Application[115] of the Guidelines, the court indicated that they "are not binding on [the] court, but may be given judicial notice to the extent they do not conflict with the statute."[116] According to the USPTO, the written description requirement is met by "show[ing] that an invention is complete by disclosure of sufficiently detailed, relevant identifying characteristics . . . *i.e.*, complete or partial structure, other physical and/or chemical properties, *functional characteristics when coupled with a known or disclosed correlation between function and structure*, or some combination of such characteristics."[117] The court was "persuaded by the Guidelines on this point and adopt[ed] the PTO's applicable standard" for analysis of the issues.[118]

The *Enzo* II court defined the issues as two-fold: 1) whether the deposits of the claimed DNA sequences may constitute an adequate written description of those sequences, and 2) whether the description requirement is met for all claims based on functional ability of the claimed DNA sequences to hybridize to strains of *N. gonorrhoeae* that are accessible by deposit.[119] Addressing the first issue, the court reiterated that deposits are typically used to satisfy the enablement requirement, not the written description requirement.[120] Yet, in a complete reversal, the court stated that its "prior decision that a deposit may not satisfy the written description requirement was incorrect," vacating the *Enzo* I holding.[121]

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109. Enzo Biochem, Inc. v. Gen-Probe, Inc., 63 U.S.P.Q.2d 1618, 1618 (Fed. Cir. 2002).

110. *Id.*

111. Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 960 (Fed. Cir. 2002).

112. *Id.*

113. *Id.* at 964.

114. Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099 (Jan. 5, 2001).

115. *Synopsis of Application*, *supra* note 1.

116. *Enzo*, 323 F.3d at 964.

117. *Id.* (quoting Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099, 1106 (Jan. 5, 2001)) (emphasis added by the court).

118. *Id.*

119. *Id.*

120. *Id.* at 965.

121. *Id.* at 960.

The court's rationale provided that Enzo Biochem's deposits were incorporated by reference into the patent, and a skilled artisan could obtain the sequences from the depository, if desired.[122] Moreover, the exact sequences may not have been "reasonably obtainable" at the time of filing due to "severe time constraints in sequencing DNA," and even if they were obtainable, the sequences were not known to Enzo Biochem at the time of filing the application.[123] The court held that compliance with the written description requirement was "grounded on the fact of the deposit and the accession number" in the body of the patent.[124]

However, Enzo Biochem deposited only three sequences.[125] The defendants argued that the breadth of the claims, which included subsequences, mutants of sequences and subsequences, and mixtures thereof, was overly broad. Even Enzo Biochem's own expert testified that the claims covered an "astronomical" number of variations.[126] Nevertheless, the court felt that it is conceivable a skilled person may readily understand whether any variations are viable. Because the level of skill is a question of fact, the court remanded the issue to the lower court for evaluation of "whether a person of skill in the art would glean from the written description, including information obtainable from the deposits of the claimed sequences, subsequences, mutated variants, and mixtures sufficient to demonstrate possession of the generic scope of the claims."[127]

With respect to the second issue, the *Enzo* II court briefly compared this case to *Lilly*, as both involved broad claims to a genus.[128] Looking at the USPTO's Synopsis of Application of the Guidelines, which includes a hypothetical example similar to the *Lilly* case,[129] the court described a contrasting example involving the use of hybridization properties to satisfy the written description requirement.[130] Enzo Biochem argued that the functional description of hybridization coupled with the deposit met the written description requirement.[131] Relying on the USPTO's analysis of hybridization claims in the Synopsis of Application example, the court held that there was a genuine issue of material fact regarding whether Enzo Biochem's claims met the written description requirement, thereby reversing the district court's grant of summary judgment for

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122. *Id.* at 965-66.

123. *Id.* at 966 (referring to U.S. Patent No. 4,900,659 (issued Feb. 13, 1990), col. 3, ll. 40-46).

124. *Id.* at 970.

125. *Id.* at 961.

126. *Id.* at 966.

127. *Id.*

128. *Id.* at 967 (citing Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559 (Fed. Cir. 1997)).

129. Example 17: Genus-species with widely varying species. *Synopsis of Application*, *supra* note 1, at 61-64.

130. *Enzo*, 323 F.3d at 967 (citing Example 9: Hybridization, *Synopsis of Application*, at 35-37).

131. *Id.* at 967-68.

the defendants.[132] The court remanded the issue to the lower court to "consider whether one of skill in the art would find the generically claimed sequences described on the basis of Enzo[ Biochem]'s disclosure of the hybridization function and an accessible structure, consistent with the PTO Guidelines. If so, the written description requirement would be met."[133]

To conclude, the court discussed the relationship among possession, reduction to practice, and the written description requirement. Stressing that a difference exists, the court emphasized that the written description requirement "is not subsumed by the 'possession' inquiry. A showing of 'possession' is ancillary to the *statutory* mandate . . . and that requirement is not met if, despite a showing of possession, the specification does not adequately describe the claimed invention."[134] Nor does reduction to practice, without an adequate description of the invention that was reduced to practice, suffice to describe or identify the invention under the written description requirement.[135] Noting that possession and reduction to practice are particularly useful when claiming priority to an earlier date of filing or invention, the court emphatically pointed out that an adequate written description is still required. "Such description is the *quid pro quo* of the patent system; the public must receive meaningful disclosure in exchange for being excluded from practicing the invention for a limited period of time."[136]

On the same day, the court published the order denying rehearing of the case *en banc*.[137] Several of the judges attached statements to the order explaining why they voted either for or against *en banc* rehearing.[138] Strangely, the commentary focused largely on the difference, or lack thereof, between the written description requirement and the enablement requirement of § 112, first paragraph.[139]

The dissent voted to rehear the case *en banc*.[140] Writing for the dissent, Judge Rader argued that the case should not be remanded to determine whether the patentee met the written description requirement.[141] According to Rader, the patentee met the *Vas-Cath* "possession" test for the written description requirement by depositing the DNA sequences.[142] Judge Rader expounded upon his understanding that the written description requirement is not separate from the enablement requirement by providing a history of written description case law and describing the factual scenarios under which the court has addressed the

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132. *Id.* at 968.
133. *Id.*
134. *Id.* at 969.
135. *Id.*
136. *Id.* at 970.
137. Enzo Biochem, Inc. v. Gen-Probe, Inc., 63 U.S.P.Q.2d 1618, 1618 (Fed. Cir. 2002).
138. *Id.* at 1618-33.
139. *Id.*
140. *Id.* at 1622-23 (Rader, J., dissenting).
141. *Id.* (Rader, J., dissenting).
142. *Id.* (Rader, J., dissenting).

written description requirement.[143] Contrasting *Enzo* to prior cases, he noted that *Enzo* did not involve new matter or priority issues—the types of issues that had previously been addressed in written description requirement cases.[144] He warned that both *Lilly* and *Enzo*, by supplanting the enablement requirement with a more arduous written description requirement that is not required by the statute, threaten to disrupt settled expectations in the inventing community by "up[ping] the ante" required to comply with patentability requirements.[145]

Disagreeing with the dissent, Judge Lourie argued that the case should not be heard *en banc* merely for the purpose of revising written description law because "[t]hat law is sound."[146] Reiterating the essence of *Vas-Cath*, he emphasized that enablement and written description are separate and distinct, pointing out the United States Supreme Court's substantiation of a distinct written description requirement in a recent case.[147] Although the written description requirement has been "applied rigorously" in recent cases, Judge Lourie expressed his belief that these cases have not been decided wrongly because they further the goal of requiring claims to be "commensurate in scope with what has been disclosed to the public,"[148] thereby avoiding overly broad claims.

In response to Judge Rader's averment that the written description requirement "operated solely to police priority,"[149] Judge Lourie explained that, when trying cases, the court merely addresses the issues raised before them. That the written description requirement arose in *Enzo* under different facts than previous cases was mere evolution of the case law.[150] Nothing existed in the law prior to *Enzo* to preclude written description cases from arising under situations other than priority contests.[151]

Furthermore, Judge Lourie countered the argument that recent written description law "elevate[s] 'possession' to the posture of a statutory test of patentability."[152] He explicated that although possession is a relevant factor for determining whether an invention has been described, demonstrating possession is not necessarily the same as providing a written description.[153] Just as written description law has its critics, it also has advocates who support a robust requirement[154] and the benefits it provides to the public.[155] According to Lourie,

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143. *Id.* (Rader, J., dissenting).

144. *Id.* (Rader, J., dissenting).

145. *Id.* (Rader, J., dissenting).

146. *Id.* at 1619.

147. *Id.* (citing Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 736-37 (2002)).

148. *Id.* at 1620.

149. *Id.* at 1626.

150. *Id.* at 1619.

151. *Id.*

152. *Id.* at 1620.

153. *Id.*

154. For critical evaluations of written description law, see, for example, Janis, *supra* note 39,

the court has "evolved a consistent body of [written description] law over a number of years, based on the statute and basic principles of patent law."[156] Thus, there is no reason to rehear *Enzo en banc* and "rewrite the statute."[157] To do so would simply delay and frustrate the remand.[158]

## IV. THE ERRORS OF *ENZO* II

### *A. Dealing with Deposits*

*Enzo* II does not comport with the written description requirement. Over at least the past twenty years, as technology has advanced, the law has been evolving toward more stringent criteria for satisfying the written description requirement. Federal Circuit cases such as *Vas-Cath*, *Fiers*, and *Lilly* have more sharply defined what is required to comply with the statute: a separate and distinct description of the invention that indicates to a skilled artisan that the inventor was in possession of the invention at the time of filing,[159] described by more than just function of the invention or the method of making and using it,[160] and that endows the skilled artisan with the ability to visualize the identity of the invention.[161] By holding that the deposit of molecules into a public depository meets the written description requirement, *Enzo* II deviates from the requirement that a written description of the invention appear in the patent disclosure.

The only "descriptions" of the DNA sequences claimed in the '659 patent were the ATCC accession numbers and the function of the sequences. Although the accession number is a unique identifier for a sample, it does not correlate to the structure, function, or any other characteristic specific to that sample; it is merely an ordinal number assigned to the sample for tracking it. The Court of Appeals for the Federal Circuit recognized this in the 1985 case *In re Lundak*, where the court found, "An accession number and deposit date add nothing to the written description of the invention. They do not enlarge or limit the disclosure."[162] Yet, in *Enzo* II, the court justified the variance from *Lundak* by

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at 59; Mueller, *supra* note 39; Rai, *supra* note 51; and Harold D. Wegner, *An* Enzo *White Paper: A New Judicial Standard for a Biotechnology "Written Description" Under 35 U.S.C. § 112, ¶ 1*, 1 J. MARSHALL REV. INTELL. PROP. L. 254 (2002). *But see* Margaret Sampson, *The Evolution of the Enablement and Written Description Requirements Under 35 U.S.C. § 112 in the Area of Biotechnology*, 15 BERKELEY TECH. L.J. 1233 (2000); Stewart, *supra* note 37, at 542-46; Scott A. Chambers, *"Written Description" and Patent Examination Under the U.S. Patent and Trademark Office Guidelines*, IP LITIGATOR, Sept.-Oct. 2000, at 9-10.

155. *Enzo*, 63 U.S.P.Q.2d at 1620-21.

156. *Id.* at 1622.

157. *Id.*

158. *Id.* at 1618.

159. Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1563 (Fed. Cir. 1991).

160. Fiers v. Revel, 984 F.2d 1164, 1171-72 (Fed. Cir. 1993).

161. Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1568 (Fed. Cir. 1997).

162. 773 F.2d 1216, 1223 (Fed. Cir. 1985).

noting that deposits are often used to meet the enablement requirement "[w]here the invention involves a biological material and words alone cannot sufficiently describe how to make and use the invention in a reproducible manner"[163] and stating that the '659 patent sequences "may not have been reasonably obtainable and in any event were not known to Enzo when it filed its application."[164] The court references a statement in the '659 patent which describes the time-intensive procedure required to sequence the genome of *Neisseria gonorrhoeae* and *Neisseria meningitidis*.[165]

However, the '659 patent does not claim DNA of either *Neisseria gonorrhoeae* or *Neisseria meningitidis*. Instead, it claims the DNA of probes that hybridize to those bacteria.[166] Probes are typically much smaller than the DNA with which they seek to hybridize. Accepting Enzo Biochem's statements that sequencing large DNA is labor- and time-intensive, the smaller probes should require much less time to sequence. Furthermore, most probes are synthetic constructs that are synthesized to have a specific sequence. This suggests that Enzo Biochem should have known the sequences of the probes they generated to selectively hybridize to the bacteria, especially since the sequences of the bacteria were at least partially known.[167] Accordingly, the DNA sequences of at least the three deposited probes should have been "reasonably obtainable" to Enzo Biochem, even at the time of filing the patent application. In that case, allowing the deposits to comply with the written description requirement rather than requiring that the probes be sequenced is not in accordance with patent law or the public policy behind it.

Moreover, the court could have simply clarified the meaning of possession. *Vas-Cath* established that the inventor must convey, to those skilled in the art, that he was in possession of the invention when the patent application was filed.[168] Yet, the application may include a *constructive* reduction to practice, meaning that the inventor has not yet made the invention but has disclosed how it will be made and used. In light of this, it is evident that possession does not necessarily imply tangible possession. Instead, it is related to conception; possession means that, in the least, the inventor possesses knowledge and understanding of his final and complete invention. Note that intangible possession must be differentiated from a mere wish or research plan; the inventor does not have possession until he knows the precise composition that he will eventually reduce to practice.

Enzo Biochem could not have met the possession test under these criteria.

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163. Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 965 (Fed. Cir. 2002) (quoting U.S. DEP'T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE § 2402 (Magdalen Y.C. Greenlief ed., 8th ed. 2001)).

164. *Id.* at 966.

165. U.S. Patent No. 4,900,659 (issued Feb. 13, 1990), col. 3, ll. 40-46.

166. *Id.* at col. 27, l. 29 to col. 28, l. 56.

167. Enzo Biochem, Inc. v. Gen-Probe, Inc., 285 F.3d 1013, 1026 (Fed. Cir. 2000) (Dyk, J., dissenting), *vacated*, 323 F.3d 956 (Fed. Cir. 2002).

168. 935 F.2d 1555, 1563-64 (Fed. Cir. 1991).

It is true that the patentee had physical possession of the materials that it deposited. Nevertheless, it did not have mental possession of its invention. Enzo Biochem was not able to describe the invention that it deposited and claimed it was because it had not sequenced the invention. In effect, the inventors had actually reduced the invention to practice without having conceived what the invention truly was. Until conception was achieved, Enzo Biochem's invention was not complete or patentable.

By reversing the holding of *Enzo* I and allowing the deposit to meet the written description requirement, the court disregarded the public policy behind the possession test. Possession is required to ensure that the inventor actually invented what he claims to have invented. If he does not possess the invention, then he cannot describe the invention. Accordingly, written description is one measure of possession. When the court allowed Enzo Biochem to use its deposit to meet the written description requirement, it did not ensure that the inventor was in mental possession of the invention. There was no measure of whether the inventor knew what he had invented or not. The court simply knew that Enzo Biochem reduced the invention to practice, with or without conception. Permitting this type of "unknown invention" does not provide the public with the *quid* that it must get in return for giving patent term exclusivity to Enzo Biochem.

The "unknown invention" may be harmful to the public in several ways. First, the public will be unaware of the metes and bounds of the invention. A prospective inventor, searching the patent literature, may not find the '659 patent unless he is looking for the same function as claimed by that patent (*viz.*, selective hybridization to *N. gonorrhoeae*). Without finding the '659 patent, he could invent another use for the claimed sequences, thereby unintentionally infringing the patent claiming the sequences. Yet, if the sequences were available in the patent literature, the prospective inventor could search sequence databases, find the '659 patent, and avoid infringement.

Second, if the prospective inventor does find the '659 patent, he will not be able to determine the scope of the claims unless he orders the deposits and analyzes the DNA sequences. Even Judge Lourie felt that this would not accord with public policy, as evidenced by his statement in *Enzo* I, "[T]o require the public to go to a public depository and perform experiments to identify an invention is not consistent with the statutory requirement to describe one's invention in the specification."[169] Just over four months later, Judge Lourie reversed that holding,[170] but he still indicated that "claims [were] being asserted to cover what was not reasonably described in the patent."[171] Although one commentator suggests that the "panel had no choice . . .,"[172] the sudden change

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169. *Enzo*, 285 F.3d at 1021.

170. Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 966 (Fed. Cir. 2002).

171. Enzo Biochem, Inc. v. Gen-Probe, Inc., 63 U.S.P.Q.2d 1618, 1619 (Fed. Cir. 2002).

172. Harold C. Wegner, *When a Written Description Is Not a "Written Description": When* Enzo *Says It's Not*, 12 FED. CIR. B.J. 271, 273 (2002). Wegner suggests that the Supreme Court's holding in *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124 (2001) set precedent with respect to deposits and the written description requirement. In *J.E.M.*, the Court held that

of opinion regarding deposits is most likely indicative of conflict among the Court of Appeals for the Federal Circuit with respect to the written description requirement. Whatever the reasoning for the reversal, in a situation like *Enzo*, description by deposit does not meet the intended requirement for public disclosure and merely frustrates the public policy behind granting a patent in the first place.

Third, the unknown invention does not provide the USPTO with the necessary information to perform patentability searches. Like a prospective inventor, the USPTO must obtain a sample and sequence it. Without sequence information, the USPTO cannot adequately determine whether the invention is novel and non-obvious. Experimentation would add cost and delay, especially considering that the USPTO does not have testing facilities to analyze samples. Consequently, the patentability search cannot be performed effectively, further harming the public.

### *B. Adoption of the USPTO's Standard*

The *Enzo* II court took judicial notice of the USPTO's Written Description Guidelines.[173] However, the court erred by implying, in dicta, that it also deferred to the Synopsis of Application[174] of the Guidelines because the examples therein are substantively flawed. Recall that the USPTO promulgated the Guidelines and the Synopsis of Application after *Lilly* to assist USPTO personnel in determining patent applicants' compliance with the written description requirement.[175] Noting that the Guidelines are not binding as law, the *Enzo* II court "adopt[s] the PTO's applicable standard for determining compliance with the written description requirement."[176] Specifically, the court refers to three examples from the Guidelines: hybridization, genus-species with widely varying species, and antibodies.[177]

*1. Analysis of the Hybridization Example.*—The hybridization example[178]

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seeds, which were deposited in a public depository, were patentable. *Id.* at 124. Wegner fails to consider that a seed is much more complex than a simple nucleic acid sequence such as those in *Enzo*. Case law has long held that complex structures may be enabled by deposit. *Enzo*, 323 F.3d at 965. Perhaps, for complex structures, deposition should also satisfy the written description requirement. Nonetheless, a per se rule that any deposit satisfies the written description requirement, no matter how simple the molecule is, does not protect public interest in disclosure of inventions. Instead, such a rule would discourage sequencing any biomolecules.

173. Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099 (Jan. 5, 2001).

174. *Synopsis of Application*, *supra* note 1.

175. *See* discussion *supra* Part II.

176. *Enzo*, 323 F.3d at 964.

177. Examples 9, 17, and 16, respectively. *Synopsis of Application*, *supra* note 1, at 35-37, 59-64.

178. Example 9: Hybridization. *Id.* at 35-37.

describes a patent specification that discloses a single cDNA (SEQ ID NO:1).[179] The cDNA encodes a protein that binds a specific receptor and stimulates a certain activity.[180] The specification exemplifies the use of a complementary[181] strand to SEQ ID NO:1 under highly stringent conditions to isolate nucleic acids which encode proteins that bind the same receptor and stimulate the same activity as above. The isolated nucleic acids are not sequenced, but their activity is demonstrated.[182]

The claim in the example is directed to "[a]n isolated nucleic acid that specifically hybridizes under highly stringent conditions to the complement of the sequence set forth in SEQ ID NO:1, wherein said nucleic acid encodes a protein that binds to a dopamine receptor and stimulates adenylate cyclase activity."[183] The USPTO's analysis indicates that SEQ ID NO:1 is novel and unobvious, and it is the only sequence disclosed within the scope of the claimed genus—nucleic acids which hybridize to the complement of SEQ ID NO:1 and encode a protein with the specified activity. Yet, the USPTO asserts that because the hybridization conditions are highly stringent, a skilled person would not expect substantial variation among species within the scope of the genus.[184] "Thus, a representative number of species is disclosed, since highly stringent hybridization conditions in combination with the coding function of DNA and the level of skill and knowledge in the art are adequate to determine that applicant was in possession of the claimed invention."[185] According to the Synopsis of Application, the invention in the hybridization example is adequately described.[186]

This analysis is incorrect for several reasons. First, a complementary strand to SEQ ID NO:1 is used as a probe. More likely than not, the target DNA will not be the same length as the probe. The skilled artisan has no means of determining, solely from hybridization, which strand is longer, the probe or the target. If the probe is longer, which nucleic acids on the probe bind with nucleic acids on the target? If the target is longer, at what location on the target does the probe hybridize? One simply has no measure for length or binding location on the target DNA by the mere fact that a probe hybridizes, even if it occurs under highly stringent conditions.

Second, highly stringent conditions do not guarantee full complementarity. One would have no means to determine which nucleic acids hybridize and which ones do not. Moreover, for the nucleic acids that do not hybridize, there is no

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179. The sequence identity number (SEQ ID NO) is the label by which DNA or protein sequences listed in a patent application are identified. Each sequence is given an ordinal number.

180. *Synopsis of Application*, *supra* note 1, at 35.

181. For every "T" in SEQ ID NO:1, the complement contains an "A" and vice versa; for every "C" in SEQ ID NO:1, the complement contains a "G" and vice versa.

182. *Synopsis of Application*, *supra* note 1, at 35.

183. *Id.* at 35-36.

184. *Id.* at 36.

185. *Id.* at 36-37.

186. *Id.*

way to know which nucleic acid is actually present in the sequence. Considering the first and second points, the applicant has not described the structure of the invention. He has no "mental picture of the structure" and thus has not yet conceived of the invention as claimed.[187]

Third, the specification contains no structure-function relationship, as recommended by the Guidelines where minimal structure is disclosed.[188] Because only one structure was described, the skilled artisan probably would not know which amino acids correlate to the activity. Accordingly, one would not know which nucleic acids must be present to encode the functional protein and which could be varied or deleted.

Fourth, a representative number of species is not disclosed.[189] Only one is disclosed: SEQ ID NO:1. Other species are mere speculation because one cannot know whether modifications of the disclosed specie will lead to the desired activity. If not, then these species do not belong to the genus.

In light of these considerations, the hybridization example does not comport with written description law. Instead, hybridization claims merely define a genus by what the DNA does, not what it is. The claims are not limited to specific metes and bounds but instead describe an unknown but potentially astronomical number of compounds of unknown sequences and structures, yielding overly broad claims.

Enzo Biochem deposited only three DNA sequences.[190] It did not sequence those DNA,[191] and thus could not describe any characteristic feature of the sequence. It could only describe the DNA by its function, the ability to hybridize preferentially to *N. gonorrhoeae* over *N. meningitidis*. Yet, in the '659 patent Enzo Biochem claimed all DNA that preferentially hybridizes in that manner, including the three deposited sequences, subsequences, mutations of those sequences and subsequences, and mixtures thereof.[192]

Applying the USPTO's analysis of the hybridization example to *Enzo*, one might conclude that any sequences, subsequences, or mutations that hybridize *N. gonorrhoeae* preferentially under highly stringent conditions would be adequately described. However, as explicated earlier, this analysis would provide no means for the skilled artisan to envision the length of the subsequences or mutations that will remain functional. Moreover, only three representative species were deposited.[193] These species were obtained using DNA that had not been sequenced; thus, SEQ ID NOs:1 and 2 (*N. gonorrhoeae* and *N. meningitidis*) were not known. Allowing this type of claim to satisfy the written description requirement would yield extremely broad scope: billions of

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187. *See* Amgen, Inc. v. Chugai Pharm. Co., 927 F.2d 1200, 1206 (Fed. Cir. 1991).

188. Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099, 1106 (Jan. 5, 2001).

189. *See* Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559 (Fed. Cir. 1997).

190. Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 961 (Fed. Cir. 2002).

191. *Id.* at 966.

192. *Id.* at 961-62.

193. *Id.* at 961.

DNA could be encompassed. Yet, coverage of that scope would be achieved *without requiring Enzo Biochem to sequence even one DNA*! That scope would allow the inventor to claim more than he has actually invented, directly contradicting the public policy of providing the inventor with patent scope that is commensurate with his contribution to the art.

*2. Analysis of the Antibody Example.*—The antibody example[194] describes a patent specification teaching that antigen X has been isolated and is useful for detecting HIV. The specification teaches the method of isolation and purification of antigen X and provides a characterization of the antigen in the form of molecular weight.[195] An example in the specification "contemplates but does not teach" antibodies which specifically bind to antigen X and asserts that the contemplated antibodies can be used in immunoassays to detect HIV.[196] The skill of the art is that antibodies are structurally well characterized, and the constant and variable regions from a variety of species have been published in the art.[197]

A claim is made to "[a]n isolated antibody capable of binding to antigen X."[198] The claim is directed to *any* antibody capable of binding the antigen. The USPTO's analysis indicates that antibody-antigen binding technology is mature, and the level of skill is high and advanced. Antigen X is novel and unobvious.[199] According to the USPTO, the skilled person considering all this would recognize that the "spectrum of antibodies which bind to antigen X were implicitly disclosed as a result of the isolation of antigen X."[200] Therefore, the Synopsis of Application asserts that the written description requirement is satisfied by this disclosure in the specification.[201]

The USPTO's analysis of the antibody example, like that for the hybridization example, allows an overly broad claim to stand. Consequently, it, too, is incorrect. Although the general structure of antibodies is well understood in the skill of the art, it does not follow that the antibody sequence is adequately described. The antibody is divided into regions of alternating constant and variable domains. The variable domains vary not only from species to species, but also from member to member. In other words, one human might not produce the exact same antibody against a given antigen as the next human would.[202] One antigen introduced into 100 different humans may produce 100 different antibodies, all of which bind the same antigen and fall within the scope of the claim.

One cannot readily hypothesize which amino acids will constitute the variable region. The sequence of the antibody's variable region will depend

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194. Example 16: Antibodies. *Synopsis of Application*, *supra* note 1, at 59-60.

195. *Id.* at 59.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 60.

200. *Synopsis of Application*, *supra* note 1, at 60.

201. *Id.*

202. JANEWAY ET AL., *supra* note 30, at 124.

upon the location on the antigen to which it binds. Considering that proteins, which can be conservatively substituted for one another, comprise an antibody, the number of possible sequences that would bind to the antigen is astronomical. Consequently, the structure or sequence of the antibody cannot be described simply by knowing the antigen's sequence.

Applying written description case law to this example, the claim cannot stand. First, the possession test cannot be met. The applicant did not make any antibodies, nor did he conceive of any antibodies that could be described by a method other than "any antibody, having a general antibody structure, which functions in this way." One cannot merely claim to possess anything and everything that works without being able to describe at least one structure or sequence. With a claim of this scope, the applicant does not have a mental picture of the structure and has not yet conceived the full invention covered by the claims.[203]

Second, no structure-function relationship is established.[204] The applicant has not described any amino acids in the antibody that are complementary to and that are responsible for the binding function of the antigen, assuming that the antigen is a protein. Even if the antigen is not a protein, no structural information can be surmised other than general concepts regarding polar attractions between the antibody and antigen. In either case, no specific structure has been described. Nor has any function been linked to any structure.

Considering the failure to meet the possession test and the lack of a structure-function relationship, such a broad antibody claim should not be permitted. It simply does not describe the antibody with any particularity such that a skilled person could visualize the invention. The claim is overly broad; any antibody subsequently developed would be covered by the scope of this claim. Thus, it does not preserve the public policy of allowing claims that are commensurate with the scope of the invention. The applicant averring this claim is asserting rights to any antibody that he may have discovered as well as any that will be developed in the future. This type of protection is not in accordance with the goals of the patent system.

### *C. Minimizing the Error of* Enzo *II*

In *Enzo* II, the Court of Appeals for the Federal Circuit remanded the case to the lower court to answer the questions of fact: whether the hybridization claims and the claims to non-deposited sequences of the '659 patent comply with the written description requirement. To ensure an appropriate outcome, the lower

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203. *See* Amgen, Inc. v. Chugai Pharm. Co., 927 F.2d 1200, 1206 (Fed. Cir. 1991).

204. *See* Guidelines for the Examination of Patent Applications Under the 35 U.S.C. 112, 1, "Written Description" Requirement, 66 Fed. Reg. 1099, 1106 (Jan. 5, 2001) ("A biomolecule sequence described only by a functional characteristic, without any known or disclosed correlation between that function and the structure of the sequence, normally is not a sufficient identifying characteristic for written description purposes, even when accompanied by a method of obtaining the claimed sequence.").

court needed to consider the technology associated with the *Enzo* case. Unfortunately, "*Enzo* III" will not resolve these issues because the parties settled the case out of court.

One major difference between *Enzo* and prior cases like *Amgen*, *Fiers*, and *Lilly* is the technology. The prior cases involved relatively simple biotech issues concerning descriptions of DNA or proteins within the scope of the claims. Conversely, *Enzo* involved technology that is more complex. Enzo Biochem's invention claimed DNA that hybridize to specific other DNA.[205] Determining whether that claim complies with the written description requirement demands full understanding of the implications of hybridization—what structural information can be inferred from hybridization under stringent conditions. The science associated with hybridization is more technologically advanced than merely determining whether the words "human insulin" adequately describe a DNA sequence.[206]

Referring to the *USPTO Guidelines* and the *Synopsis of Application of the Guidelines*, the *Enzo* court also discussed antibody technology.[207] Like hybridization, the antibody field is more complex than the technology of previous cases. In what may be regarded as dicta, the court addressed hybridization and antibody technologies and then stated that it adopts the standards of the *Guidelines* for determining compliance with the written description requirement.[208]

The complexity of hybridization and antibody technologies has not been fully considered and analyzed by the court. To ensure appropriate outcomes in future cases with such complex technologies, the science relating to those technologies should be thoroughly addressed. The court should consider factual assessments controverting the examples in the *Synopsis of Application*,[209] and contrast assessments in support thereof. Only then can the court accurately decide whether deference to the *Synopsis of Application* is appropriate.

## V. THE EFFECT OF *ENZO* II ON PATENT PRACTICE AND BIOTECHNOLOGY

### *A. A Post-*Enzo *Biotech Written Description Case: The* TKT *Case*

Since *Enzo*, the Court of Appeals for the Federal Circuit has decided another biotech written description case, *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*[210]

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205. U.S. Patent No. 4,900,659 (issued Feb. 13, 1990), Claims 1-3, at col. 27, l. 29 to col. 28, l. 30.

206. Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1568 (Fed. Cir. 1997).

207. Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 964 (Fed. Cir. 2002).

208. *Id.*

209. *See* discussion *supra* Part IV.B.

210. 314 F.3d 1313 (Fed. Cir. 2003). To distinguish this case from *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200 (Fed. Cir. 1991), the short citation for this case will be "*TKT*." TKT is used rather than Hoechst because most of the arguments revolve around Transkaryotic Therapies, Inc.'s technology.

This was a patent infringement case involving five patents, each being a continuation[211] of the Amgen patent litigated in the 1991 case of *Amgen, Inc. v. Chugai Pharmaceutical Co.*[212] These patents broadly claimed compositions, processes, or uses related to Amgen's pioneering erythropoietin (EPO) product, Epogen®. Epogen® was launched in 1989,[213] and since that time, the product has become a huge success, earning billions of dollars in sales.[214] When Hoechst Marion Roussel and Transkaryotic Therapies (collectively "TKT") collaborated to launch a competing product, HMR4396,[215] Amgen filed a declaratory judgment action against them,[216] alleging that HMR4396 infringed Amgen's patents.[217]

The main difference between Epogen® and HMR4396 is the production technology. TKT's EPO product is produced through an innovative process referred to as "endogenous" expression.[218] This process inserts a non-native "promoter" upstream from the native EPO gene in human cells. This promoter activates the gene to produce high amounts of EPO.[219] Endogenous expression was discovered approximately ten years after Amgen's patent priority date.[220]

Amgen's product is produced using "exogenous" expression.[221] Amgen introduces the EPO gene into Chinese hamster ovary (CHO) cells, a type of mammalian cell, which use their own native processes to produce the human EPO protein. Exogenously expressed EPO differs from native human EPO only by the glycosylation pattern.[222]

Amgen's patent claims did not specify endogenous or exogenous production, but their patents exemplified only exogenous production.[223] TKT argued that the Amgen patents did not meet the written description requirement because they

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211. A "continuation" is a subsequently filed application having the same disclosure as the previous application but introducing a new claim set or further right to prosecution. *See* U.S. DEP'T OF COMMERCE, MANUAL OF PATENT EXAMINING PROCEDURE § 201.07 (Magdalen Y.C. Greenlief ed., 8th ed. 2001). The continuations involved in the *TKT* litigation included U.S. Patent Nos. 5,955,422 (issued Sept. 21, 1999) (the '422 patent); 5,756,349 (issued May 26, 1998) (the '349 patent); 5,621,080 (issued Apr. 15, 1997) (the '080 patent); 5,618,698 (issued Apr. 8, 1997) (the '698 patent); and 5,547,933 (issued Aug. 20, 1996) (the '933 patent). *TKT*, 314 F.3d at 1319-23.

212. 927 F.2d 1200 (Fed. Cir. 1991).

213. Epogen® Backgrounder, *at* http://www.amgen.com/product/epogen/epogenBackgrounder.html (last visited Oct. 22, 2003).

214. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 126 F. Supp. 2d 69, 77 (D. Mass. 2001).

215. *Id.* at 94.

216. *TKT*, 314 F.3d at 1319.

217. *Id.* at 1324-25.

218. *Id.*

219. *Id.* at 1325.

220. *Id.* at 1334.

221. *Id.* at 1321.

222. Glycosylation is the pattern of branched carbohydrate chains that bind to the protein structure. *Id.* at 1321-22.

223. *Id.*

failed to "sufficiently describe the use of all vertebrate and mammalian cells," and they excluded endogenous EPO DNA, both expressly and implicitly.[224]

As written description is a question of fact, the Court of Appeals for the Federal Circuit examined the district court's finding for clear error.[225] The District Court of Massachusetts rejected TKT's written description argument, holding that TKT had proven Amgen's failure to meet the written description requirement only by a preponderance of the evidence rather than by clear and convincing evidence.[226] On appeal, TKT argued that it had indeed "clearly and convincingly proven invalidity" under *Lilly*, *Enzo* II, and *Gentry Gallery*.[227] Judge Michel, writing for the majority, did not agree.[228]

The *TKT* case provided the Court of Appeals for the Federal Circuit a means to discuss recent written description requirement cases. The court explained:

> We held in *Eli Lilly* that the adequate written description of claimed DNA requires a precise definition of the DNA sequence itself—not merely a recitation of its function or a reference to a potential method for isolating it. . . . More recently, in *Enzo Biochem*, we clarified that *Eli Lilly* did not hold that all functional descriptions of genetic material necessarily fail as a matter of law to meet the written description requirement; rather the requirement may be satisfied if in the knowledge of the art the disclosed function is sufficiently correlated to a particular, known structure.[229]

The majority distinguished *Lilly* and *Enzo* II from *TKT* by explaining that "the claim terms at issue here are not new or unknown biological materials that ordinarily skilled artisans would easily miscomprehend."[230] Here, the terms "vertebrate" and "mammalian" simply designate the types of cells used to produce the EPO protein. In contrast, these terms in *Lilly* modified the invention itself—the protein—an "undescribed, previously unknown DNA sequence. . . ."[231] The *TKT* majority agreed with the district court's holding that the specification's description, which included two examples of vertebrate and mammalian cells used, adequately supported claims to EPO produced by "the genus vertebrate or mammalian cells."[232]

Moreover, the majority rejected TKT's argument that *Gentry Gallery*[233] requires essential elements of an invention to be incorporated into patent claims.

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224. *Id.* at 1331.
225. *Id.* at 1330.
226. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 126 F. Supp. 2d 69, 101 (D. Mass. 2001).
227. *TKT*, 314 F.3d at 1331.
228. *Id.*
229. *Id.* at 1332 (citations omitted).
230. *Id.*
231. *Id.*
232. *Id.*
233. Gentry Gallery, Inc. v. Berkline Corp., 134 F.3d 1473 (Fed. Cir. 1998).

TKT argued that Amgen's use of certain terms[234] in the specification as well as representations made during patent prosecution limited the scope of Amgen's claims to exogenously produced EPO.[235] TKT alleged that exogenous expression was an essential element of Amgen's invention and thus should be required to limit the claims.[236]

The majority disagreed. It stressed that, despite popular opinion, *Gentry Gallery* did not introduce an "essential elements" test but instead applied "the settled principle that a broadly drafted claim must be fully supported by the written description and drawings."[237] According to the court, Amgen's statements, unlike *Gentry*'s, did not indicate "that exogenous expression is the *only* possible mode of the invention or that other methods were outside the stated purpose of the invention."[238] Furthermore, the court "cannot invalidate a patent for failure to describe a method of producing the claimed compositions that is not itself claimed," especially considering that the other method was not developed until ten years after the patent application was filed.[239] Thus, the majority held the district court was not clearly erroneous in its finding that Amgen's patents satisfied the written description requirement.[240]

The dissent, written by Judge Clevenger, strongly disagreed with the majority's written description decision. Judge Clevenger asserted that the issue is "whether Amgen's disclosure of *one* means of producing synthetic EPO in mammalian cells, namely exogenous DNA expression, entitles it to claim *all* EPO produced by mammalian cells in culture, or *all* cultured vertebrate cells that produce EPO."[241] Yet, the district court and the majority refused to consider this issue because the asserted claims were directed to compositions, not processes.[242]

Judge Clevenger emphasized that claim limitations that are essential to patentability must comply with the written description requirement of § 112, first paragraph.[243] Here, the majority allowed composition claims to stand with modifiers such as "non-naturally occurring" and "purified from mammalian cells grown in culture" without requiring compliance. According to Judge Clevenger:

> The majority holds that patentees are free to decorate their composition claims with source and process limitations without any concern for whether the full scope of those limitations is enabled or described, and

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234. Terms included statements such as the following: the advantage of Amgen's invention was "freedom from association with human proteins" and the invention was "uniquely characterized" by exogenous expression. *TKT*, 314 F.3d at 1331.

235. *Id.* at 1331.

236. *Id.*

237. *Id.* at 1333.

238. *Id.*

239. *Id.* at 1334.

240. *Id.*

241. *Id.* at 1359 (Clevenger, J., dissenting).

242. *Id.* (Clevenger, J., dissenting).

243. *Id.* (Clevenger, J., dissenting).

> that these requirements of section 112 are waived so long as the patentee succeeds in characterizing its claims as "product" claims. Competent patent attorneys should be quick to take advantage of the majority's broad exemption from the disclosure requirements by the appropriate phraseology. Rather than endorse the district court's elevation of form over substance, I would vacate its decision . . . and remand for further consideration in light of the vast scope of the claims in suit for which there appears to be insufficient . . . written description.[244]

Furthermore, Judge Clevenger disagreed with the majority's opinion that *Lilly* and *Gentry Gallery* did not apply to this case.[245] He asserted that by dismissing *Lilly*, the majority "verges on confining [Eli] Lilly to its facts."[246] *Gentry Gallery*, he argued, is inescapably parallel: the claims recite elements readily found in the specification but did not include limitations on the "arrangement" of the elements. The Amgen patents did not include the arrangement of "the non-human control sequences and coding DNA . . . on an exogenous expression vector in the cell."[247] According to Judge Clevenger, the majority's holding allows claims to "become more resistant to written description challenges the more broadly drafted they are."[248]

### *B. Analysis of* TKT *and the Effect of* Enzo *on Written Description Law*

The inflection point where the robust requirement for written descriptions changed direction appears to be the reversal of *Enzo* I. Up to that point, much dissension was noted among patent practitioners with respect to case law, especially after the *Lilly* case.[249] Yet, the strong conflict of opinions in the Court of Appeals for the Federal Circuit concerning written description law did not become apparent until the denial of the *en banc* hearing for *Enzo* I.[250] At that time, written description law seems to have changed. The balance between public disclosure and exclusivity for the inventor shifted from a position emphasizing public disclosure to a position emphasizing inventors' needs.

From *Vas-Cath* through *Lilly*, the court stressed the importance of describing the full scope of the claims. This precedent required that the description be sufficient to allow the ordinarily skilled artisan to recognize that the applicant invented what was claimed.[251] Evidence of conception—a mental picture of the invention—must be present.[252] The invention must be described by more than

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244. *Id.* at 1359-60 (Clevenger, J., dissenting).
245. *Id.* at 1360-61 (Clevenger, J., dissenting).
246. *Id.* at 1361 (Clevenger, J., dissenting).
247. *Id.* (Clevenger, J., dissenting).
248. *Id.* (Clevenger, J., dissenting).
249. *See supra* note 154.
250. *See* discussion *supra* Part III.C.
251. Vas-Cath, Inc. v. Mahurkar, 935 F.2d 1555, 1563 (Fed. Cir. 1991).
252. *See* Amgen, Inc. v. Chugai Pharm. Co., 927 F.2d 1200, 1206 (Fed. Cir. 1991).

mere function.[253] The description cannot be a simple wish or research plan, but instead must be a description that has definite boundaries, such that the members of the genus can be visualized or recognized.[254] By requiring that the specification include a written description of the sequences deposited to comply with the requirement,[255] *Enzo* I followed this line of precedent.

With the reversal of *Enzo* I, written description law appears to have veered away from precedent. *Enzo* II allowed incorporation by reference of three deposited sequences to serve as written description of those species.[256] This does not follow precedent because, without physically obtaining samples from the depository and sequencing them, the skilled artisan would have no way to visualize the boundaries. Enzo Biochem or the USPTO could not visualize the boundaries either. The court's comment that the sequences were not obtainable to Enzo Biochem is no justification for this exception to precedent. These molecules were small enough that they could have been readily sequenced.[257] It appears that the court made a decision to relax the written description requirement. Then, by adopting the USPTO's standard for determining compliance with the written description requirement in the *Synopsis of Application*, the *Enzo* II court suggested that it may allow extremely broad claims to stand—claims to compositions whose structures are not described anywhere in the patent.[258] This is certainly not in accordance with precedent.

The Court of Appeals for the Federal Circuit confirmed this change in philosophy toward the written description requirement in the *TKT* case. Although the court stated, "A broadly drafted claim must be fully supported by the written description and drawings," it allowed Amgen to have very broad scope of its patent claims.[259] Despite limitations in the claims, the court granted interpretations of the limitations that went beyond descriptions in the specification itself. TKT challenged the court to apply precedent to Amgen's patents, precedent that would require a robust description of the entire claimed invention, limitations included. Yet, the court refused to apply the precedent. By doing so, the court effectively limited the precedent to its facts, thereby allowing broad scope of the claimed invention and contradicting the written description requirement of cases like *Fiers* and *Lilly*.

*TKT* demonstrates the derogation of public policy associated with permitting broad patent claims. Even though the method of endogenous expression was not developed until ten years after Amgen filed its patent application, the scope of its claims were so broad that they covered all methods of expressing EPO in mammalian and vertebrate cells. TKT's advancement of the technological field,

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253. *See* Fiers v. Revel, 984 F.2d 1164, 1169 (Fed. Cir. 1993).

254. *See* Regents of Univ. of Cal. v. Eli Lilly & Co., 119 F.3d 1559, 1568 (Fed. Cir. 1997).

255. Enzo Biochem, Inc. v. Gen-Probe, Inc., 285 F.3d 1013, 1023 (Fed. Cir.), *vacated*, 323 F.3d 956 (Fed. Cir. 2002).

256. Enzo Biochem, Inc. v. Gen-Probe, Inc., 323 F.3d 956, 965-6 (Fed. Cir. 2002).

257. *See* discussion *supra* Part IV.A.

258. *Enzo*, 323 F.3d at 967.

259. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1333 (Fed. Cir. 2003).

through the development of the endogenous expression method, was found to infringe Amgen's patent.[260] That holding of infringement will prevent TKT's product from being marketed, resulting in a lack of competition which will likely keep Epogen®'s price at its current level. Additionally, litigation is tremendously expensive; Amgen may even have to raise its price to pay costs. Moreover, TKT may have nothing more than litigation expenses and trial experience to show for its advancement of the technology. Considering that Amgen never produced or even conceived of producing EPO using the endogenous method, the negative impact on the economic investment and subsequent fallout cannot be justified.

## CONCLUSION

Patent protection of biotech inventions is essential to provide incentive for investment and development. To date, biotech inventions have proven to be extremely useful as medical diagnostics, pharmaceutical treatments and prophylaxes, and much growth of the industry is expected to continue in the future.[261]

Yet, to ensure continued growth, patent protection must be provided that is commensurate with the contribution of the invention to the art. The written description requirement is one means of assurance. By strictly requiring written description of the invention, the public is guaranteed that the inventor was in possession of the invention when the patent application was filed. In effect, the written description defines the scope of the invention—the metes and bounds that will be given exclusivity. The scope should be neither too narrow nor too broad.

The *USPTO Synopsis of Application of the Written Description Guidelines* represent very broad, relaxed interpretations of the law for biotech patent claims. They allow the inventor to satisfy the written description requirement by providing very little contribution to the skill of the art. Indeed, in the hybridization and antibody examples, the inventor need not provide any structural information for the actual invention.[262] Such broad scope is in direct conflict with the public policies of advancing science, improving healthcare, and promoting industrial growth. Enforcement of these overreaching claims would be devastating to the field of biotechnology.

Cases such as *Enzo* II, which defers to the broad claim interpretation of the *Guidelines*, and *TKT*, which seems to limit *Lilly* and *Gentry Gallery* to their facts, evidence a change in the stringent requirement for written description. Rather than allowing moderate claim scope that is proportional to contribution, the court appears to be moving toward allowing broad, overreaching claims. This change in direction will lead to even more confusion in an already unsettled area of patent law, leaving the patent practitioner to guess how to satisfy the written description requirement.

Nonetheless, litigation over the written description requirement continues.

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260. *Id.* at 1358.

261. Das, *supra* note 26, at 14.

262. *See Synopsis of Application*, *supra* note 1, at 35-37, 59-60.

Hopefully, the courts will thoroughly consider the complexity of technology in the current cases and reevaluate the *Synopsis of Application of the Written Description Guidelines*. Results at the district court level for the *Rochester* case[263] indicate a possible return to moderation of claim scope. Yet, the ultimate standard for written description remains unresolved until future cases like *Enzo* III and *Ariad Pharmaceuticals, Inc. v. Eli Lilly & Co.*[264] are decided.

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263. Univ. of Rochester v. G.D. Searle & Co., Inc., 249 F. Supp. 2d 216 (W.D.N.Y. 2003). *See* introductory discussion *supra*.

264. *Ariad Announces Filing of Lawsuit Against Eli Lilly Alleging Infringement of Pioneering NF-KB Treatment-Method Patent*, at http://media.corporate-ir.net/media_files/nsd/aria/releases/062502-2.pdf.

# JUDICIAL DEFERENCE AND UNIVERSITY ACADEMIC POLICY MODIFICATIONS: WHEN SHOULD COURTS INTERVENE ON BEHALF OF INJURED STUDENTS?

MICHAEL J. NATALI*

## INTRODUCTION

During the last several years, faculties from countless colleges and universities have voted to introduce or modify existing academic policies at their universities.[1] Many college academic policies are considered purely academic in nature, such as permitting a professor to determine her students' academic performance in class and what grade each student has earned. There are other university policies, such as a university's disciplinary procedures and graduation requirements, which may be considered academic questions in some sense, but have been more appropriately characterized by most courts as procedural in nature.[2] Other policies cannot be characterized very easily as either academic or administrative in nature.[3] College policies in this category are seemingly neither purely academic nor purely administrative in nature, but seem to embody elements from both of those categories where neither the academic nor the administrative characteristics of the policy can be changed without somehow having an influence on the other.

One such timely example is university grading policies. In recent years, countless colleges and universities have modified their grading policies to include plus and minus grades.[4] Discussions regarding the benefits and

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1. Donald E. Coleman, *Grading Proposal Defeated: Fresno State's Academic Senate Rejects System of Pluses, Minuses*, FRESNO BEE, Apr. 28, 1998, at B3; Kevin Cullen, *Plus/Minus Grading Policy Scrutinized*, J. & COURIER, Apr. 27, 1999, at 1B; Amy Olson, *Committee Evaluates Plus-Minus Grading at U. Minn.*, MINN. DAILY, Jan. 14, 1999; Brian Westley, *James Madison U. Implements Plus/Minus Grading System*, THE BREEZE, Dec. 10, 1998; Ryan D. Wilson, *Grading System Under Fire*, TOPEKA CAPITAL-J., Nov. 29, 1998.

2. *See, e.g.*, Johanna Matloff, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169, 200 (2001); Scott R. Sinson, Note, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L. REV. 195 (1997).

3. *See infra* Part III.B.

4. *See* Lindsey Baker, *Nebraska Faculty Ponders New Plus-Minus System*, DAILY NEBRASKAN, Feb. 8, 2001; Gale Chambers, *Baylor U. Council of Deans Considering Adding Minuses to Grading System*, LARIAT, May 2, 2002; Erica Cordova, *U. Hawaii Professors Petition for Grading Change*, KA LEO O HAWAII, Nov. 13, 2001; Jason Gallagher, *Pluses, Minuses May Be in Kent State U. Students' Futures*, DAILY KENT STATER, Feb. 21, 2002; Melissa Lee, *At First Look, U. Nebraska's New Grading Scale Has Little Effect*, DAILY NEBRASKAN, Jan. 17, 2002 [hereinafter Lee, *At First Look*]; Melissa Lee, *Plus/Minus System Here to Stay at U. Nebraska*, DAILY NEBRASKAN, Aug. 26, 2002; Anna Simon, *Clemson Faculty Oks Plus, Minus Grades*,

shortcomings of such grading policy changes have circulated among faculty at colleges and universities across the country.[5] While one school of thought maintains that the change will aid students in the long term,[6] there is no question that resident students who receive grades in the interim transition period may indeed be harmed.[7] For instance, the implementation of a plus/minus grading system where none previously existed presents the following possible harms: (1) straight-A students that would have received a 4.0 could receive a GPA as low as 3.67 under the new system,[8] (2) the lack of an A+ in most plus/minus systems does not allow the best students to compensate for lower A grades, and (3) because a C- is weighted as a 1.67, a student could be put on academic probation if he/she had straight C minuses (as opposed to 2.00 good standing before).[9] This average GPA decline for the top of the class creates problems for those students regarding scholarship funds,[10] graduate school prospects,[11] job prospects, and academic honors.[12] Accordingly, many students in the top of their class have

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GREENVILLE NEWS, May 9, 2001, at 1B.

5. Kim Aichele, *UI Grading Policies Subject of Debate*, DAILY ILLINI, May 4, 1998. *See* Baker, *supra* note 4; Cordova, *supra* note 4.

6.

> Faculty say the system will more accurately reflect the quality of a student's work and will allow better student comparisons. For example, under the traditional A, B, C, D, F system, a student whose average is an 89 throughout the semester and a student whose average is 80 could both receive a B, which is worth 3 points when calculating a student's grade point average. Under the new system, the first student would receive a B, or a 3.3 GPA, and the other student would receive a B-, or a 2.7 GPA—a difference of more than half a grade point.

Randy Gleason, *Illinois Wesleyan Looks at Grades' Pluses, Minuses*, THE PANTAGRAPH, Feb. 8, 1997. *See also* Chambers, *supra* note 4; Lee, *At First Look*, *supra* note 4; James Shepherd, *Follow Towson U.'s Lead*, THE TOWERLIGHT, Apr. 24, 2000.

7. David Lord, *CSU Better Off Minus Plus/Minus System*, ROCKY MOUNTAIN COLLEGIAN, Mar. 24, 1998 (asserting plus/minus grading is the most atrocious grading).

8. *Id.* "Students who usually score on the lower end of each grade are punished by plus/minus. No longer will students have the motivation to work extra hard at the end of the semester in the hopes of pushing their grade to the next level." *Id.*

9. *Id.* "Finally, the worst aspect of this system is that it reeks of potential breech [sic] of contract. Students who entered CSU under one system of grading have had the carpet pulled out from under their feet and the rules changed in the middle of the game. This is completely unfair." *Id.* "Of equal importance is the lack of uniformity among classes and sections. Theoretically, two students could take different sections of the same class. If both scored a 92 percent and one student had a teacher who used plus/minus and the other did not, one would receive a 4.0 and the other would receive a 3.67." *Id.*

10. Melissa Lee, *U. Neb. Students Fear Loss of Scholarships with New Grading System*, DAILY NEBRASKAN, Jan. 16, 2002.

11. Patti Vannoy, *U. Neb. Students Concerned About Grading System's Effect on Grad School Admissions*, DAILY NEBRASKAN, Jan. 18, 2002.

12. Lindsey Baker, *Honors Students Feel Effects of New U. Neb. Grading System*, DAILY

adamantly opposed the introduction of new plus/minus grading systems at their universities through their student governments, petitions, or pleas to faculty and administrations.[13] The question now arises whether courts should even entertain student claims that are seemingly academic in nature, such as ones involving grading policy modifications, and if so, what legal model should courts use to adjudicate those claims?

School faculty and administrators often make decisions which modify university academic policies, or at least alter the method in which those policies are implemented. In many cases, those policy changes are provided for in the university's catalogue. For example, many universities retain the right to change the academic criterion on which they may expel a student as long as the student is notified in advance.[14] There are instances where institutions of higher education make substantial modifications to their academic grading policies in student catalogues and handbooks, and those modifications result in serious detrimental effects on students.[15] For example, college catalogues prescribe graduation criteria, major coursework requirements, grade point average requirements for good standing and honors, and various administrative procedures. When these requirements are altered unexpectedly, students may suffer injurious effects, such as the additional tuition and time required to take a newly-required class, or graduating at a later date than anticipated. Litigation has arisen between students and universities regarding policy modifications that have deprived students of the educational benefit the students expected to receive when they enrolled.[16]

Judicial treatment of student academic challenges has a profound effect on the self-determination of students seeking higher education, a profound effect on the degree of latitude educational institutions have to change their academic policies, and a profound effect on the range of legal recourses students may pursue when confronted with academic policy changes that are injurious to them. Not only have grading policy modifications and other academic policy adjustments been intensely debated between college faculty and administrations,[17] but it also has motivated scores of news stories, student

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NEBRASKAN, Mar. 22, 2001.

13. *Id.*; Sonja Bjelland, *Students Read Between the Lines*, THE MANEATER, Sept. 2, 1997 (Student Senator Matt Dimmic led a protest against the new grading system last spring, and a task force sent information to all voting faculty); Caroline Craig, *Clemson U. Students Speak Out Against Grading Changes*, TIGER, Jan. 18, 2002; Kevin Darst, *Student Election at CSU Drawing to Close*, FORT COLLINS COLORADOAN, Mar. 25, 2001; Aaron Sorenson, *Year-old U. Minn. Grading System Meets Mixed Responses*, MINN. DAILY, Dec. 4, 1998; Ryan D. Wilson, *ESU Faculty Urges Plus/Minus Choice*, TOPEKA CAPITAL-J., Apr. 8, 1999; Ryan D. Wilson, *Students Participate in Walkout to Protest Grading System*, TOPEKA CAPITAL-J., Apr. 23, 1999.

14. *See generally* BUTLER UNIV., CATALOGUE 12 (2000-02); ANDERSON UNIV., CATALOGUE 6 (1998-00).

15. *See supra* notes 10-13.

16. Specif cases are addressed in *infra* Part II of this Note.

17. *See supra* notes 1, 4.

government initiatives, and education journal articles on the advantages and disadvantages of such changes.[18] No journal article has yet addressed the legal issues confronted when academic policy changes are enacted.

This Note contends that the judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced and that courts should not hesitate to intervene on behalf of student claimants. Courts have already recognized the validity and utility of student suits under theories of contract, quasi-contract, and estoppel regarding many types of student-university disputes, in large part due to the changed expectations of the parties reflecting economic and academic pressures. Academic policy modification cases constitute the precise type of student claim which courts have increasingly recognized as appropriate to protect students and to ensure the viability of higher education altogether.

Part I of this Note discusses the judicial deference historically accorded to educational institutions, the current trends and adjustments of judicial deference to educational institutions, and the pervasiveness of the increased commercialization of higher education. Part II discusses possible claims against universities making academic policy modifications under contract, quasi-contract, and estoppel theories, and also briefly discusses the possible remedies under those various theories. Finally, in Part III, the author briefly recommends a possible model which courts may use to evaluate student claims involving academic policy modifications in order to achieve the fairest remedy possible.

## I. THE STUDENT-UNIVERSITY LEGAL RELATIONSHIP

The judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced. Courts should not hesitate to intervene on behalf of student claimants. The courts have come far from their strict adherence to the principles of *in loco parentis* by protecting student expectations and incurred costs under claims of contract and estoppel in a variety of situations. Nevertheless, courts frequently hesitate to intervene on the behalf of injured students in many cases when the alleged university action may be deemed academic in nature. Institutions of higher education are becoming more commercialized in nature all the time, and no longer maintain the same status they did during Colonial times when the doctrine of *in loco parentis* was the legal rule applied to student-university disputes. Indeed, the academic expectations of both students and universities concerning their obligations to each other require that courts extend their willingness to depart from their deferential position and hear student academic claims.

While courts have recognized that the laws of contract may define the student-university relationship in many respects, they have largely avoided applying ordinary commercial contract doctrines completely.[19] Today, most courts do acknowledge the contractual nature of the student-university

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18. *See supra* notes 5-13.

19. *See, e.g.*, Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975).

relationship, but nevertheless rationalize exceptionally harsh treatment of student litigants.[20] This harsh treatment of student claims is particularly surprising in light of the general trend of contract law in other areas, where modern courts interpret vague or ambiguous terms against the drafter and have not hesitated to void unconscionable provisions.[21] Typically, courts rationalize their harsh treatment of student litigants by asserting that contract law should not be rigidly applied. Furthermore, courts have also justified a stricter standard for students by declaring that the student-university relationship is by its very nature unique. It is unclear exactly how such statements are helpful, since any business is in some sense unique when compared with other businesses.[22] Nevertheless, many courts seem to think that some particular, unidentifiable characteristic of higher education makes commercial contract doctrine inappropriate.[23]

Of course, not all courts use this rationale to deny student contract claims. Several, such as in the case of *Lowenthal v. Vanderbilt University*, have rejected assertions that the special nature of universities made them immune to ordinary contract principles.[24] The court also dismissed Vanderbilt's argument that a ruling for the plaintiff would have "dire consequences" for higher education.[25] A brief discussion of the transformation of institutions of higher education from *in loco parentis* to primarily an economic transaction explains why courts should, as some courts already have, shed deferential treatment toward educational institutions.

During the first years of the Republic and the Colonial period, colleges provided higher education modeled after those institutions in Great Britain.[26] The English model was characterized by unqualified institutional control of students by the educational institution. The concededly one-sided relationship between the student and the college in American schools mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from

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20. William W. Van Alstyne, *The Student as University Resident*, 45 DEN. L.J. 582, 584, 591 (1968).

21. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); *see also* Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991).

22. Contract law has been flexible enough to adjudicate disputes among people in very complex relationships; it is applied, for example, to disputes among family members, Bogigian v. Bogigian, 551 N.E.2d 1149 (Ind. Ct. App. 1990), in intimate relationships, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (en banc), between physicians and their patients, Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973), and in long-term, complex commercial relationships, Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515 (Ohio 1990).

23. Jansen v. Emory Univ., 440 F. Supp. 1060, 1062 (N.D. Ga. 1977).

24. No. 8-8525, Chancery Court of Davidson County, Tennessee (Aug. 15, 1977); *see also* Niedermeyer v. Curators of Univ. of Mo., 61 Mo. App. 654 (1895) (where student plaintiff had accepted an offer contained in a catalogue of the university defendant fixing the tuition fee).

25. *Lowenthal*, No. 8-8525.

26. J. BRUBACHER & W. RUDY, HIGHER EDUCATION IN TRANSITION 3 (3d ed. 1976).

medieval Christian theology and the unique legal privileges afforded the university corporation.[27] The dominant legal philosophy courts used to describe this one-sided relationship was a doctrine called *in loco parentis*.[28] Essentially, courts refused to interfere with college authorities regarding either academic or disciplinary matters, and students had very little chance of successfully petitioning the courts for redress in practically any situation.[29]

Following the Civil War, an increasingly industrialized society forced colleges to respond to the demand for technically specialized workers. As the schools grew in size, the intimacy and paternalism that characterized the English and Colonial models of higher education became increasingly difficult to maintain. Thus, the old college ideal based on the cohesiveness of a small community diminished with time.[30] By the second half of the twentieth century, many courts acknowledged that the doctrine of *in loco parentis* no longer provided a satisfactory solution to student-university disputes. Courts increasingly used principles found in contract law, but usually applied those principles more strictly when the application favored the institution, and less strictly if the application would have favored the student.[31]

The tendency of institutions of higher education to become more commercialized in nature from Colonial times to the present supports the contention that those institutions should no longer maintain the same status they once did.[32] The nature of the student-university relationship explains why courts deferred to institutions of higher education in Colonial times, why courts have hesitated to defer quite as heavily in many cases involving student-university disputes in the last century, and why courts today should not hesitate to set aside their deferential treatment of educational institutions in the academic arena. Indeed, judicial treatment of the legal relationship between students and universities has in part reflected the evolution of the other facets of the student-university relationship, including economic, academic, and social relationship changes. What students and universities actually expect from each other and their agreements today is quite different than what they expected in past years. Courts today have recognized student suits in contract, quasi-contract, and estoppel theories.[33] However, because much, if not all, of the protections afforded students turn on the degree of deference accorded educational institutions by courts, it is very important to understand why courts have withdrawn from absolute deference in many cases and chosen to evaluate student

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27. Brian Jackson, *The Lingering Legacy of* in loco parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1138 (1991).

28. *Id.* at 1139.

29. *Id.*

30. *Id.* at 1142.

31. *See, e.g.*, Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975); Carr v. St. John's Univ., 231 N.Y.2d 410 (App. Div. 1962); Koblitz v. Western Reserve Univ., 21 Ohio C.C. 144 (1901).

32. *See* Jackson, *supra* note 27, at 1148-49.

33. *See infra* Part II.

claims in the first place. Once the reasons for not according absolute deference to educational institutions in some cases are understood and articulated, one can easily extend those reasons not to accord undue deference to colleges, where appropriate, to the academic arena as well.

Relying on the "unique characteristics" of educational institutions, many courts have avoided acknowledging the evolution of most schools from intimate colleges to massive universities. However, the trends of universities to implore marketing practices and become more consumer-oriented best describes the transformation of the paternalistic college described by *in loco parentis* to the modern university. By purposefully pursuing "university-status" through these practices, institutions of higher education have characterized themselves in different terms than those traditionally accorded judicial deference. First, contemporary active marketing is one of the clearest indications that institutions of higher education are becoming more commercial in nature. Higher education is viewed, and views itself, as a business with education as its product. Since the 1960s, there has been a tremendous growth in higher education; between 1960 and 1990, the number of institutions of higher education increased by fifty-seven percent, from 2008 to 3535.[34] Due to the skyrocketing number of student applications during these decades, colleges and universities began competing aggressively for students.[35] The explosion of the number of colleges and the number of students attending college necessitates that student choice increasingly drives recruitment efforts; therefore, colleges must actively and aggressively market themselves to stand apart from other colleges.[36] In addition, institutions developed many new academic programs and majors to attract new students; as a result, many colleges increasingly relied on marketing and a self-developed image to promote their schools.[37]

A second indicator of the increasing commercialism in higher education is the tendency of institutions of higher education to become more consumer-oriented. As a trend in higher education, the typical college student is increasingly less characterized as an innocent child sent away to college, and is more often regarded as a knowledgeable buyer. For example, many students are now non-traditional students who work and raise families while attending school.[38] Many students have specific career goals and desire convenience and flexibility. Today, many students expect the university to accommodate the

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34. Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 792 (1996) (describing the commercial nature of higher education).

35. *See id.*

36. John Martin & Thomas Moore, *Problem Analysis: Application in Developing Marketing Strategies for Colleges*, 66 C. & UNIV. 233, 235 (1991).

37. Mark S. Neustadt, *Is Marketing Good for Education?*, J.C. ADMISSION, Winter 1994, at 21.

38. *See* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 193 (2000).

student's schedule and interests, and not vice versa.[39] Indeed, many colleges cater their programs to consumer-oriented students, and have influenced the market in a dramatic way, encouraging even those schools who wish to maintain a traditional image to rethink how they sell education and treat students as consumers.[40]

Courts must scrutinize the nature of modern education to decide if it remains entitled to extraordinary deference. Undoubtedly, education serves an important role in society; yet, no rationale justifies a unique and peculiarly harsh treatment of students in litigation. Indeed, most schools now resemble small towns instead of intimate collegiate institutions. Without a well-defined judicial role, the deference accorded to institutions of higher education leaves students vulnerable and without an adequate remedy when those institutions place their own economic goals over their students' needs. Though some courts are understandably reluctant in certain cases to step into the middle of university-student disputes, and they correctly note that it is inappropriate to substitute their own judgment for the institution's academic and management decisions, they nevertheless must find a comfortable role that acknowledges the consumer nature of the student-university relationship. After all, students lose other opportunities when they purchase an educational product from an institution of higher education. The judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced, and courts should not hesitate to intervene on behalf of injured student claimants.

## II. ANALYSIS OF STUDENT LEGAL THEORIES

This Section discusses the complicated and vague university-student legal relationship. Some aspects of the relationship are analogous to commercial contracts, yet other aspects of the relationship seem to reveal that the student-university relationship is also status-oriented and described in associational terms. Courts have struggled over the last half-century to find a unifying theory with which to define the student-university relationship and resolve conflicts that arise between students and the universities they attend. Courts have relied on principles of contract, estoppel, and quasi-contract and implied-in-law principles to evaluate student claims. When an institution changes its academic policies or criteria in its various programs, the interests of the university and the student may

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39. *See* William A. Kaplin & Barbara A. Lee, *A Legal Guide for Student Affairs Professionals* § 12.3.3.3, at 542 (1997). The Student-Right-to-Know provisions of the Higher Education Act evidences congressional recognition that higher education is a product and that parents and students are properly asking more consumer-oriented questions before making the decision to attend a particular college or university. H.R. Rep. No. 101-518, at 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3363, 3363-64 at 3364.

40. It is further noteworthy that schools themselves have contributed to the commercialization of education by an increasing involvement in nonacademic enterprises, such as retirement homes, vacation homes, and real estate development. *See* Eric N. Berg, *Academic Capitalism Helps Make Ends Meet*, N.Y. TIMES, Jan. 5, 1986, at 39.

collide, and courts will again be asked to intervene on the behalf of injured students.

Undoubtedly, many courts have chosen in many situations not to interfere in university-student disputes at all for fear of encroaching upon the university's academic judgment. However, courts striving for equitable results to both universities and students given the modern nature of their relationship may follow in the direction of other courts under contract and estoppel theories. Most court opinions regarding student-university disputes do not build a complete framework with which to evaluate student claims. This Part attempts to build such a framework by imposing some organization on the legal principles emerging from student-university dispute cases. The following discussion illustrates the routes a court may pursue if it chooses to shed its deferential view and adjudicate student claims on their merits.

### *A. Contract Theory*

The most frequently used legal claim of students for challenges against institutions of higher education at present is contract law. This legal theory is also the most successful by students. Much reputable authority holds that a contractual relationship exists between the student and the university.[41] Essentially, the contract is the agreement that if the student pays tuition and achieves satisfactory results in the course of study, the student will eventually receive a degree.[42] The obvious sources of such contract rights are university catalogues, student handbooks, "guidelines," and other published texts on the one hand, and oral representations by teachers and administrators on the other. This section discusses the student-university contract and its primary sources, the terms of the contract, and the interpretation of those terms, including how

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41. *See* Kraft v. William Alanson White Psychiatric Found., 498 A.2d 1145, 1148 (D.C. 1985) (interpreting terms in School of Psychiatry catalogue creating contract); DeMarco v. Univ. of Health Scis., 352 N.E.2d 356, 366 (Ill. App. Ct. 1976) (ordering school to issue degree to plaintiff in recognition of student's fulfillment of contract between university and student); Booker v. Grand Rapids Med. Coll., 120 N.W. 589, 591 (Mich. 1909) (finding student has contractual right not to be arbitrarily dismissed from college); Barker v. Bryn Mawr Coll., 122 A. 220, 221 (Pa. 1923) (stating that private college's relationship with students is contractual); Victoria Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 702-09 (1985) (tracing development of student-university contractual relationship).

42. *See, e.g.*, John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (noting that implied condition of contract between student and institution is that student will follow rules and regulations of school and that such terms and conditions are those set forth by publications of institution at time of student's enrollment); Univ. of Miami v. Militana, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966) (accepting that conditions and terms for graduation are to be found in college's publications which are available to student at time of enrollment); People *ex rel.* Cecil v. Bellevue Hosp. Med. Coll., 28 N.E. 253 (N.Y. 1891) (holding that college's announcement in its circulars specifying fees to be paid, course of study, and necessary qualifications for degree are terms of offer that, once accepted by student, must be fulfilled by college).

specific the terms must be to be enforced, the effect of a catalogue disclaimer, and some other various rules governing contract interpretation in the academic challenge setting.

*1. The Source: The College Catalogue.*—Colleges make representations and offer their terms of enrollment to students both orally and through certain printed resources, in particular the college catalogue.[43] One of the reasons that the college catalogue is so useful to determine exactly what promises are made to a student is because the policies and procedures outlined in the catalogue are definite and measurable.[44] The typical college catalogue contains policies and procedures concerning admissions, financial aid, registration, academic and disciplinary matters.[45] The catalogue also outlines other requirements and expectations, including grade-point-average requirements, required courses, and application procedures.[46]

The college catalogue serves marketing and informative purposes. The catalogue is intended to inform students of the college's expectations, advise students of the requirements and the standards of the college, and describe the educational offerings and the other resources of the institution.[47] Again, although one of the catalogue's functions is to advertise for the institution by offering statements on the high quality and excellence of the institution, the college's objectives, and the college faculty, the catalogue also tries to convey the substance of the agreement between the student and the university, or at the least the expectations that the student should have of the institution and vice versa.[48]

College catalogues often contain dull, technically-written descriptions of courses, degree requirements, schedules, and procedures. Colleges make both very vague and very specific promises and representations to students in their catalogues. On a general level, colleges promise to educate and to enhance the attending student's life and character.[49] On a more specific level, the college institution might also inform students of the faculty-student ratio, the credentials of its faculty, the value of a degree, the costs of education, the courses offered, and the specific degree requirements of the institution.[50]

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43. *See* Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972) (stating that "catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become part of the [student-university] contract"); David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, J.C. & U.L. 201, 202 (1985).

44. Davenport, *supra* note 43, at 202.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 202, 208 ("Although it is not generally labeled as a contract and the parties do not sign it, the catalog is widely considered the central document in the university-student contractual relationship.").

49. *See* Trs. of Columbia Univ. v. Jacobsen, 148 A.2d 63, 67 (N.J. Super. Ct. App. Div. 1959).

50. Johnson & David Sallee, *Marketing Your College as an Intangible Product*, J.C. ADMISSION, Summer 1994, at 19.

Most frequently, a court does not dispute the existence of a student-university contract, but focuses its efforts on deciphering what exactly each party has obligated itself to do; this is where the language of the catalogue, what it contains, and what it is understood to be by the entering student is of utmost importance.

*2. Unconscionability—Is There a Contract at All?*—Despite the obvious adhesionary attributes of the student-university contract, including those one-sided, take-it-or-leave-it express terms in the catalogue as well as the general vulnerability of students,[51] courts do not generally find that the contract between the student and the institution is unconscionable.[52] Adhesionary contracts are not necessarily unconscionable as long as the terms are fair; but, if there is a lack of meaningful choice and unequal bargaining power, unfair provisions within a contract generally are subject to a heightened vulnerability to judicial intervention.[53] Though most courts do not find that a student-university contract is unconscionable, several successful claims of unconscionability have been found in proprietary trade school cases.[54]

Interestingly enough, courts seldom consider the relative age, immaturity, economic status, or lack of education of students as factors to evaluate the unconscionability of a student-university contract, even under those precise circumstances that they would recognize unconscionability in a contract case in another context. In fact, demonstrating this peculiarity, one court implied an equality of sophistication when it noted that the student-plaintiff "was not an unsophisticated teenager at the time and admitted that she was familiar with university 'ropes.'"[55]

Interestingly, when a university benefits by enforcing a contract between itself and a student, courts generally find the contract valid and not unconscionable on the grounds that the student is indeed a savvy, sophisticated shopper of higher education.[56] It is those precise qualities which have led courts to dispose with the doctrine of *in loco parentis* and rely on contract principles to resolve student challenges in the first place. Ironically, it is this precise recognition of contract principles that has allowed the court to bind students to the agreements they made when they enrolled at their college and lends support to the position that commercial contract principles should be used when the student stands to benefit from enforcing the same contract. It seems that the court's refusal to find university-student contracts unconscionable, along with its

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51. *See generally* Dodd, *supra* note 41, at 714-18 (discussing adhesion contracts and arguing that the "student-university contractual relationship" is an example of an adhesion contract).

52. Davenport, *supra* note 43, at 212-13 (noting courts' reluctance to apply the doctrine of unconscionability in the student-university relationship).

53. *Id.*

54. *See, e.g.*, Weaver v. Am. Oil Co., 276 N.E.2d 144, 148 (Ind. 1971).

55. Hershman v. Univ. of Toledo, 519 N.E.2d 871, 876 (Ohio Misc. 1987).

56. *See generally* Don F. Vaccaro, Annotation, *Absence from or Inability to Attend School or College as Affecting Liability or Right to Recover Payments for Tuition or Board*, 20 A.L.R.4th 303, 306 (1983).

reasons for doing so, supports the proposition that the court should apply commercial contract principles to a challenging student's claim and not make a finding that the student-university relationship is somehow "unique." If the student was a savvy buyer who had shopped around for this particular school which had made particular promises in its contract, then the university should be held to the terms which it had promulgated as a part of its enticement to the challenging student. Is there a contract at all? The courts have almost without exception answered yes. The reasons the courts have rejected the contention that the student-university contract is unconscionable are the precise reasons why contract law should be used to afford students more protection.

*3. What Are the Terms of Student-University Contract?*.—A number of rules guide the interpretation of contracts. Some of these rules of interpretation found in most major contract hornbooks have been particularly helpful to many courts hearing student-university disputes, and offer particular devices that may help courts determine which factors to weigh when resolving the precise terms to which the university and the student have obligated themselves.

*a. Catalogue disclaimers and the possible boilerplate problem.*—Although a college's catalogue may constitute the written part of the contract between the educational institution and the student, many college catalogues also contain broad language disclaiming liability and reserving the institution's right to alter the contract.[57] The disclaimer contained in most catalogues is very similar in nature. Many educational institutions have added the disclaimer to the beginning of their most recently-published catalogues in response to the complaints and possible suits by injured students.[58] Anderson University's catalogue contains a typical disclaimer:

> The university and its various units reserve the right to revise, amend, alter and change from time to time its policies, rules, regulations and financial charges including those related to admission, instruction and graduation, without notice to students. The university reserves the right to withdraw curricula and specific courses, alter course content, change the calendar and withdraw or change programs and majors offered by the university without notice to students.[59]

In addition to reserving the right to change anything and everything, some catalogues specifically disclaim contractual liability as well.[60] The Anderson University catalogue further states: "The material contained in the Anderson University Undergraduate College Catalogue is for information only and does not

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57. *See* Basch v. George Washington Univ., 370 A.2d 1364, 1366-67 (D.C. 1977) (relying on a reservation of rights clause to justify an abrupt and marked tuition increase at a medical school); Eisele v. Ayers, 381 N.E.2d 21, 26 (Ill. App. Ct. 1978) (upholding a university's reservation to increase tuition).

58. *See, e.g.*, ANDERSON UNIV., CATALOGUE (2001-03); BUTLER UNIV., CATALOGUE (2000-02); PURDUE UNIV., CATALOGUE (2000-02); *see also supra* notes 1, 6, 9, and 13.

59. ANDERSON UNIV., CATALOGUE (2000-02), at 2.

60. Tobias v. Univ. of Tex., 824 S.W.2d 201, 211 (Tex. App. 1991).

constitute a contract between the student and the university."[61] If interpreted literally, then the pages of pictures and descriptions are meaningless, and the school has essentially promised nothing at all to the student.

Courts have been inconsistent in interpreting the meaning of the disclaimer's effect on the student-university contract.[62] Some courts, even after they have held that the implied contract between students and the university encompasses more than only the provisions of the catalogue, nevertheless hold that the disclaimer, even a broad-sweeping or severe one, is a valid waiver of contractual liability for representations made to students and for program modifications after enrollment.[63] On the other hand, many courts regard the express disclaimer within the catalogue as completely ineffective in the broader context of the relationship.[64] As a sort of middle ground, other courts have interpreted disclaimers within catalogues as valid only to the extent the changes to policies and terminations of the educational programs are instituted in good faith and are not arbitrary.[65]

The Boilerplate Problem: According to Murray, no set of problems in modern contract law may be more perplexing than those associated with the massive use of standardized, printed writings to evidence the contract.[66] The basic problem may be stated as follows: since virtually no consumer bothers to read the printed clauses in documents in regular use, is the non-drafting party bound by all the terms contained in the document? One view responds that one is bound by the terms of a form whether she read it or not; this view has been deemed unrealistic as demonstrated by the continuing failure of consumers to read the boilerplate provisions of standardized forms. There have always been exceptions to the idea that one is bound to a particular document whether he reads it or not.[67] This problem is akin to what Murray calls the "battle of the forms" where merchants do not read or understand their own printed forms, much less those received from the other party.[68]

Murray points out the substantial intersection between the problem of

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61. ANDERSON UNIV., CATALOGUE (2000-02), at 2.

62. *See* Davenport, *supra* note 43, at 221.

63. *Tobias*, 824 S.W.2d at 211.

64. *See* Craig v. Forest Inst. of Prof'l Psychology, 713 So. 2d 967, 969, 973-76 (Ala. Civ. App. 1997).

65. The middle ground applies in quasi-contract and implied-in-law contracts discussed in Part II.C. *See also* Lesure v. State, No. 89-347-II, 1990 WL 64533, at *3 (Tenn. Ct. App., May 18, 1990).

66. John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982).

67. These exceptions include documents that may not even be contractual such as checks and invoices, when one party signs under duress or misrepresentation, and where a contract is unconscionable. *See* Charles v. Charles, 478 S.W.2d 133 (Tex. App. 1972) (holding a written statement in promissory note not part of the contract).

68. *See* John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1317 (1986).

whether one is bound by particular printed clauses and the concept of unconsionability discussed in the previous section: certain boilerplate provisions in agreements are not binding because they would result in "surprise or hardship" to the party against whom they are designed to operate.[69] The relationship between these concepts is designed to permit courts to exercise their power to remove terms that do not manifest apparent assent.[70] The *Restatement (Second)* adds more clarification: "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."[71]

A party has "reason to believe" that the other party would not have manifested assent to the agreement if the inclusion of a particular term is "bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction."[72] If the term is hidden, then the "adhering party" had no opportunity to read the term, and the inference is further reinforced.[73] However, the Restatement no place suggests that "reason to believe" is predicated upon the terms being illegible or hidden.[74]

Applying these settled principles to the disclaimer of liability in college catalogues regarding the academic obligations of the university and the student, if the college has "reason to believe" that the students would not assent to the agreement if they understood what the disclaimer would mean for the student's and the university's obligations, then the disclaimer is not part of the agreement.[75] First, the college has "reason to believe" the student would not assent if the particular term is "bizarre or oppressive;"[76] the court may note the student's poor bargaining under this language, position or lack of expertise and find the disclaimer term itself bizarre or oppressive, and thus give it no effect. However, this is unlikely because courts have almost uniformly held that the general contract between the student and the university is not unconscionable.[77] Of course, the court may nevertheless deem the particular language and

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69. JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 97(A), at 503 (3d ed. 1990).

70. *Id.* at 504.

71. RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981) [hereinafter RESTATEMENT].

72. *Id.* § 211 cmt. f.

73. *Id.*

74. *Id.*; *see also* MURRAY, *supra* note 69, at 505. Also, the test is very similar to that of unconscionability, leading critics to argue that if a term is legible, then it is not governed by this section in the Restatement, but should be governed by the unconscionability sections, *id.*; however, the language of the Restatement here with respect to hidden clauses includes "eviscerate the non-standard terms explicitly agree to" and "the dominant purpose of the transaction," language which does not exist in the unconscionablity tests. Thus, though the test here is similar to the one for unconscionability, it is not identical, and the court may find a term unenforceable even if the contract as a whole is enforceable. *Id.*

75. *See supra* note 71.

76. *See* MURRAY, *supra* note 69, at 505.

77. *See supra* note 52.

placement of the disclaimer in the catalogue as oppressive even where it finds the contract as a whole enforceable.

Secondly, the college has "reason to believe" the student would not assent if the particular term "eviscerates the non-standard terms explicitly agreed to."[78] This language serves to draw into doubt the validity of a clause disclaiming all liability because the disclaimer would explicitly conflict with the rest of the catalogue, where pages upon pages of promises, descriptions and obligations of students, faculty, departments and registrars are set forth. In most cases, the other promised terms in the catalogue, such as course requirements and majors offered, may certainly be characterized as "non-standard terms explicitly agreed to"[79] by students because it was likely upon those criteria that the students selected the particular college and programs they chose. Students choose the college they wish to attend because of the education and college life offered,[80] not because of the standard disclaimer of liability in the catalogue. It would not be a stretch for a court to disregard a clause disclaiming liability for changing the terms of its catalogue because the term would eviscerate the non-standard terms to which the parties explicitly agreed.

Third, the college has "reason to believe" the student would not assent if the particular term "eliminates the dominant purpose of the transaction."[81] The "dominant purpose" of the transaction between the student and the university is for the student to conform and obligate herself to the rules and procedures contained in the college catalogue and handbooks in return for those promises obligating the college to confer upon the student that which it stated it would in its own college catalogue.[82] If the university's disclaimer of liability "reserves the right to revise, amend, alter and change from time to time its policies, rules, regulations and financial charges including those related to admission, instruction and graduation, without notice to students . . . and to withdraw curricula and specific courses, alter course content, change the calendar and withdraw or change programs and majors offered by the university without notice to students,"[83] the disclaimer is arguably diametrically opposed to the very purpose of the transaction. The court may disregard the disclaimer for changing the terms of its catalogue because the term eliminates the dominant purpose of the transaction; in that case, the court may eliminate the clause altogether, or the court may choose to limit the degree to which the clause allows the institution to make modifications to its catalogue that would "eliminate the dominant purpose of the transaction."[84]

The courts have also fashioned a concept called the "reasonable expectation" test for such boilerplate provisions: the parties are bound by those terms in a

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78. RESTATEMENT, *supra* note 71, § 211 cmt. f.
79. *See id.*
80. *See supra* note 39.
81. RESTATEMENT, *supra* note 71, § 211 cmt. f.
82. *See supra* note 48.
83. *See* ANDERSON UNIV., CATALOGUE (2000-02), at 2.
84. *See* RESTATEMENT, *supra* note 71, § 211 cmt. f.

printed document that they *reasonably expect* document to contain, regardless of what the actual document contains.[85] Thus, if the written agreement contains unexpected, materially risk-shifting terms, the non-drafting party is not bound to those terms.[86] This test is most often used by courts in the "take-it-or-leave-it" contracts, such as insurance contracts and automobile sales.[87]

Applied to catalogue clauses disclaiming liability, the court may find that a particular disclaimer fails to meet the reasonable expectation test. In the first regard, it is not dispositive whether the document actually contains the provision, it is only relevant what the students expect the catalogue to contain.[88] If the disclaimer is risk-shifting, the court may find it does not meet the reasonable expectation test. Since the disclaimer effectively obligates the university to do nothing despite its many pages of specific promises regarding major coursework, grading policies and student behavior, the entire risk of enrolling at the college rests squarely and solely upon the students. Furthermore, the college catalogue terms are typically "take-it-or-leave-it" terms because the student cannot negotiate the terms in the catalogue. Thus, if a court adopted the "reasonable expectation" test, it would not have much trouble concluding that it has not been met regarding a disclaimer of liability in a catalogue.

In sum, a court may find that a clause disclaiming liability should not be enforced if the college has "reason to believe" that the students would not assent to the agreement if they understood what the disclaimer would mean for their and the university's obligations. The court may note the students' poor bargaining position or lack of expertise and thus find the disclaimer term bizarre or oppressive, it may disregard a clause disclaiming liability for changing the terms of its catalogue because the term would eviscerate the non-standard terms to which the parties explicitly agreed, or it may disregard the disclaimer for changing the terms of its catalogue because the term eliminates the dominant purpose of the transaction. Furthermore, the court may choose not to exclude the disclaimer term altogether, but to limit the degree to which the clause allows the institution to make modifications to its catalogue that would eliminate the dominant purpose of the transaction. The court may also find the disclaimer clause in a student catalogue should not be enforced because it does not meet the "reasonable expectation" test. Thus, there are several ways that a court may alleviate the harsh all-encompassing disclaimer in college catalogues by applying settled principles of contract law regarding boilerplate clauses. However, if a court chooses to defer heavily to the educational institution, it may find that the disclaimer clause, however broad and encompassing, is a valid waiver of all the students' contract protections.

*b. Specificity of terms.*—The principle requiring definiteness or specificity generally maintains that, even though the parties intended to form an agreement, if the terms of their agreement are not sufficiently definite or reasonably certain,

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85. MURRAY, *supra* note 69, at 506.

86. *Id.*

87. *Id.*

88. *Id.*

then the contract, or at least the part that lacks sufficient specificity, does not exist.[89] At some point, the terms of an agreement may be so unclear that a court will not be able to determine whether any breach occurred because the court cannot be certain of what may have been breached.[90] The modern tendency is found in *Restatement (Second)* and focuses on the overriding question of whether the parties manifestly intended to make an agreement; if that can be shown, the remaining concern is whether the terms are definite enough to permit the courts to appropriate a remedy.[91] Professor Corbin summed up the principle of definiteness nicely: "[a] court cannot enforce a contract unless it can determine what it is."[92]

Students sometimes allege that their college misrepresented certain specific characteristics of their program, that officials gave false assurances of student ability to succeed or to find employment, that the institution failed to follow or changed stated procedures or prescribed requirements, or that the school failed to deliver the program as it specifically promised.[93] Contract claims that challenge the general quality of instruction and are not based on specific breaches that are objectively verifiable are more likely to fail because the promises are often too vague and illusory.[94]

However, courts tend to shed their deferential view when colleges make concrete representations. For example, when personnel misrepresent the type and quality of equipment and facilities available to recruiting students, the claim of misrepresentation is potentially viable, or when schools misrepresent the accreditation status of the school, or fail to deliver the educational program promised, the claims may succeed if the terms the college allegedly breached were sufficiently specific.[95] Though vague promises about a student's future

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89. MURRAY, *supra* note 69, § 38(A); *see also* Ault v. Pakulski, 520 A.2d 703 (Me. 1987); Porter v. Porter, 637 S.W.2d 396 (Mo. Ct. App. 1982).

90. *See, e.g.*, Klimek v. Perisich, 371 P.2d 956 (Or. 1962). Many older cases found indefiniteness to be fatal; however, modern courts are much less willing than their predecessors to regard indefiniteness as fatal. *See In re* Sing Chong Co., 617 P.2d. 578 (Haw. Ct. App. 1980). Modern courts follow the following policy: "[t]he law leans against the destruction of contracts for uncertainty." *Id.* at 581.

91. MURRAY, *supra* note 69, § 38(A).

92. 1 CORBIN CONTRACTS § 95, at 394 (1963).

93. *See* Blane v. Ala. Commercial Coll., Inc., 585 So. 2d 866, 868 (Ala. 1991) (finding that recovery under a breach of contract or fraud claim is unavailable when a college merely promised that the student would have the minimum skills necessary for a job in a particular field); Dizick v. Umpqua Cmty. Coll., 599 P.2d 444, 445 (Or. 1979) (en banc) (holding that the college made fraudulent misrepresentations when representatives of the college told a student that he could receive advanced welding training).

94. Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119-20 (Conn. 1996) (holding that general claims about quality are not actionable).

95. *Dizick*, 559 P.2d at 449 (reinstating a damages award to a student where a community college falsely represented the type of equipment that would be available to him in welding classes); Lesure v. State, No. 89-347-II, 1990 WL 64533, at *4-5 (Tenn. Ct. App. May 18, 1990) (finding

advantage in the job market are generally not actionable (such as when a student is not prepared for a particular job), institutions are certainly more vulnerable to student claims when the student alleges that the institution made specific and objectively determinable promises or representations. These promises, if sufficiently specific, are a part of the agreement between the student and the university and are enforceable, whether the promise was made in a college catalogue, by a recruiter, or in the college's promotional materials.

The degree of specificity of the terms outlining an institution's academic policies may well determine whether a student challenge regarding those academic policies when modified by the university will be successful. The academic terms at issue in those disputes may include such items as course content, grading criterion, grade-point-average requirements for graduation, or courses required to graduate with a particular major.[96] On one end of the spectrum, it may be very clear to a court what the parties expected from the presence of a particular term, such as where a catalogue term dictates that a history major must take at least two courses from European history courses offered.[97] On the other end of the spectrum, it may be very ambiguous what the parties expect from a particular term, such as where the college catalogue states that a particular course cannot be taken until either a prerequisite course is completed or the student gets her faculty advisor's permission, and then the student actually enrolls in the course assuming her faculty advisor would grant permission, and the faculty advisor later indeed affirms that such permission would have be given.[98]

In the case of modified academic policies, such as a specific term in the college catalogue prescribing the grading scheme or effective curve that professors should use to grade students, the court will likely consider the specificity with which the term is stated in the catalogue as a factor when determining if that term was breached by the modification. For example, where a college does not state its grading scheme at all, students likely have less chance of success in challenging the modification of the grading scheme; whereas a college that prescribes in detail in its catalogue circulated to students the precise grading curve, or the precise grading scheme, the court will more likely consider that term's modification without consent a breach of contract. In sum, if the promise made by the educational institution is specific, it is much more likely that a court will enforce that provision.

*c. The transaction must be viewed as a whole.*—The guiding principle that the transaction must be viewed as a whole states that different parts of an agreement must be viewed together, i.e., as a whole, and each part interpreted in

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liability where the university misrepresented that the respiratory therapy school was accredited); Am. Commercial Colls., Inc. v. Davis, 821 S.W.2d 450, 452 (Tex. App. 1991) (finding a breach where a catalogue promised such things as qualified teachers, modern equipment, a low teacher to student ratio, and excellent training aids).

96. Hershman v. Univ. of Toledo, 519 N.E.2d 871, 876 (Ohio Misc. 1987).

97. *See, e.g.*, ANDERSON UNIV., CATALOGUE (2000-02), at 100.

98. *See, e.g., id.* (caption number 4650).

the light of all the other parts.[99] Thus, an interpretation which gives meaning to every part of the agreement will be preferred to one that gives no effect to a part.[100] A corollary to the rule that the contract should be interpreted as a whole is that all of the different writings relating to the same agreement should be interpreted together.[101]

Applied to terms found in the college catalogue that prescribe the academic obligations of the university and the student, the court will look not just at the term at issue in isolation, but also at the other obligations as the parties understood them at the time the parties committed to their agreement. For example, when a college catalogue prescribes a particular grading scheme in its catalogue, the court should also look to other sections in the catalogue, in the student handbook, and in other writings that give effect to that grading scheme. Thus, the court may observe the grade point average (GPA) required to maintain scholarships in one section of the catalogue, the GPA required to remain in good standing in another section of the catalogue, the GPA required to receive academic honors in another section of the catalogue, the GPA required to participate in extracurricular activities in the student handbook, and the GPA required by that school's graduate school programs in different writings or catalogues altogether. The requirements in each of these materials together must be interpreted in the light of all the other parts, and an interpretation which gives meaning to every one of those sections of the agreement will be preferred.

With this principle in mind, on the one hand, a court may determine that the GPA requirements in every section, including the section which outlines the grading scheme, were designed in such a way to reward certain categories of students (those with high GPAs) and punish other categories of students (those with low GPAs).[102] That design, as a whole, constitutes the terms to which the student agreed to submit to evaluation; thus, modifying only one section, such as the section outlining the grading scheme, also alters the effective terms outlined in the other sections.[103] In that instance, the court could easily find that modifying one aspect of the grading policy, without adjusting the other terms accordingly to not punish or reward students in different categories than would have been punished or rewarded under the terms the students agreed, would constitute a breach of those terms. Thus, this rule of interpretation may aid those students injured by losing scholarship moneys, good standing, academic honors, or denial to their school's graduate program by virtue of the modification.

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99. MURRAY, *supra* note 69, § 88(A); *see also* RESTATEMENT, *supra* note 71, § 202(2) cmt. d.

100. Intertherm, Inc. v. Coronet Imperial Corp., 558 S.W.2d 344 (Mo. App. 1977).

101. *See* Paisner v. Renaud, 149 A.2d 867 (N.H. 1959); RESTATEMENT, *supra* note 71, § 202(2).

102. For example, GPA requirements for academic honors reward the students with high GPAs, and GPA requirements for academic dismissal punish students with low GPAs. *See supra* notes 6, 8.

103. *See supra* notes 8-13 (explaining the harm when a college changes one aspect of its grading policy without adjusting for the change in other sections).

On the other hand, if a court defers to the judgment of the college because of its unique character as an institution of higher education, and because the grading policy seems academic in nature and thus left to the college's expert judgment, then the court will likely conclude the modification is not a breach. However, the court would still need to explain why a change in the "academic" section that produces many effective modifications in other sections that are not academic in nature is not a breach of those terms.

*d. The public interest should be favored.*—If the agreement in question affects the public interest, it is often stated that an interpretation will be preferred that is most favorable to the public interest.[104] This rule is closer to one of construction than interpretation because the theory is not that it aids in determining the intention of the parties, but that it is based on the policy that it is desirable to favor the public interest where there is doubt as to the intended meaning.[105]

Applied to terms addressing the academic obligations of the university and the student, the courts have noted that there is certainly a public interest that should be taken into account before any substantial modifications are enacted. Community groups, affected businesses, alumni, donors, and others are particularly situated to have their voices and opinions considered by college decision-makers regarding university administrative or academic decisions.[106] Participation by such interest groups should be liberally granted in such cases where broad community interests are at stake. The court demonstrates how important it believes these public sentiments to be because after litigation commences, even where those groups are not parties to the litigation, their opinion provides a complete presentation of difficult issues so that the court may reach a proper decision.[107]

It is difficult to determine how these public interests would affect the court's evaluation of the modification without much speculation. One could speculate that certain businesses near a college campus would desire that the college keep as many students enrolled as possible, while graduate school admissions boards may desire that the college institute more strict grading policies to help them evaluate students' undergraduate work. In any event, when interpreting exactly what a catalogue term promises, the court should pay attention to what interpretation would be most favorable to the public interest.

*e. The subsequent conduct of the parties should be considered.*—Evidence that the parties have started to perform and their performance manifests a common understanding of the prior agreement will be given a great deal of

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104. MURRAY, *supra* note 69, § 88(E); *see also* RESTATEMENT, *supra* note 71, § 207.

105. MURRAY, *supra* note 69, § 88(E). This rule is used most frequently in challenges involving governmental units.

106. The courts welcome and encourage amicus curiae submissions from these entities in student-university cases. United States v. El-Gabrowny, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994).

107. Alexander v. Hall, 64 F.R.D. 152, 155 (D.S.C. 1974).

weight in determining the meaning of the agreement.[108] Sometimes the expression "course of performance" is used to refer to that conduct the parties engage in pursuant to their agreement.[109] Course of performance requires repeated occasions for performance with knowledge of the nature of the performance and opportunity for objection to it by the other party that would indicate acceptance of or acquiescence in such performance.[110] Furthermore, as few as two instances could qualify as "repeated occasions."[111] Where there are repeated occasions for performance by one party with knowledge and opportunity for objection by the other party who does not object, there is no question that a course of performance has been established.[112] Also, if the parties have knowingly engaged in repeated occasions of performance which are inconsistent with the express terms of the contract, they have manifested their intention to modify their contract.[113]

Applied to terms addressing the academic obligations of the university and the student, it seems that a course of performance can be established rather easily. The court may view each semester of enrollment as a "repeated occasion" for performance; also, no objection on the part of the student to the manner in which the student is treated academically, though given the opportunity to object, would be considered acquiescence to that interpretation of the term in the agreement.[114] Once the "repeated occasion" and the "no objection" requirements are met, course of performance is established.[115] Thus, the court would lend a great deal of weight to the course of performance as it represents a common manifestation of their understanding of the prior agreement.[116] Once the terms of the agreement are interpreted with more specificity by the course of performance doctrine, any modification of the those terms can be considered breach of contract. An even more compelling situation exists where the term at issue was both expressly stated in the catalogue and then subsequent action by the university confirmed the modified contract language.

Thus, for example, if a university's grading criteria were prescribed for in its academic catalogue, but reasonable persons could differ as to what the catalogue language actually meant, the court could use the rule of course of performance

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108. MURRAY, *supra* note 69, § 88(F); *see also* RESTATEMENT, *supra* note 71, § 204 cmt. g. "It is quite the universal holding that, where the interpretation of a contract is fairly debatable, the court will adopt the practical construction which the parties to the contract have heretofore adopted." Fort Dodge Co-op Dairy Mktg. Ass'n v. Ainsworth, 251 N.W. 85, 87 (N.D. 1935).

109. MURRAY, *supra* note 69, § 89(E).

110. *Id.*

111. *Id.*; Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772 (9th Cir. 1981).

112. Blue Rock Indus. v. Raymond Int'l, Inc. 325 A.2d 66 (Me. 1974); MURRAY, *supra* note 69, § 89(F).

113. *See* Westinghouse Credit Corp. v. Shelton, 645 F.2d 869 (10th Cir. 1981).

114. Of course, the university must also not object; however, this will not likely be the issue because it is the university's academic policy modifications that are generally at issue.

115. *See* MURRAY, *supra* note 69, at 432.

116. *Id.*

to conclude that the language was to be interpreted in accordance with the manner in which the university currently applies the grading criteria. Any subsequent modification of the current application of the grading criteria, even if reasonable persons could conclude that the modification is consistent with the catalogue's explicit terms, could thus be considered a breach of contract because the term was altered, provided that the challenging students either were not made aware of the change or objected to the change if they were aware of it.

The one difficulty faced by students regarding course of performance is that once an academic policy modification is made known to them, they must object or else risk modifying their contract with respect to that particular term. One of the requirements of a valid modification of a term is that the students have knowledge of the nature of the performance and be provided an opportunity for objection to it.[117] Therefore, if the students are not presented with a forum in which to learn about, and object to, a new academic policy modification, then they could not have acquiesced to the modification.

However, if the students are unmistakably made aware of new proposed academic policy changes, and have knowledge that the new modified policy affects their agreement with the university, and the students nevertheless do not object, then the court may consider the university contract modified to include the new academic policy. For example, even if a new grading change is inconsistent with the express terms of the catalogue, since the students have manifested their intention to modify their contract by having knowledge of the change and not expressing their objection, the new grading change will become the new term of the contract, and the students will not likely subsequently challenge the new academic policy.

*f. Construction against the drafter.*—It is a general rule of interpretation that an agreement is to be interpreted most strongly against the party responsible for its drafting.[118] The rule is particularly applicable where the person or party who drew the writing had special competence in the matter. The rule finds its most frequent application in cases dealing with insurance contracts and other contracts containing standardized terms.[119] The reason for the approach in this rule is that the drafter had control over the language and may have left the language less than clear so as not to assert the other party to certain troublesome possibilities of which the drafter now seeks a favorable interpretation.[120] Because the drafter is responsible for the unclear language, it should be interpreted against him even if he intended no advantage to himself in drafting it.

Applied to terms regarding the academic obligations of the university and the student, the student may benefit where a term in the catalogue is ambiguous. Because the college is the part that drafted the catalogue and is thus responsible for any possible unclear language, the ambiguous language should be interpreted against the college, even where the college did not intend to create an advantage

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117. *See id.*

118. *Id.* § 88(G); *see also* United States v. Turner Constr. Co., 819 F.2d 283 (Fed. Cir. 1987).

119. Nat'l Ins. Underwriters v. Carter, 551 P.2d 362 (Cal. 1976).

120. MURRAY, *supra* note 69, § 88(G); RESTATEMENT, *supra* note 71, § 206 cmt. a.

for itself.[121] Also, the university may not be vague in its terms only to ask the court to interpret the term in its favor. For example, if the college catalogue describes a particular grading system, and the new modified grading system is more detailed, so that it may be interpreted either as a new grading system (the students' position) or merely a more detailed description of the same grading system (the university's position), the students' interpretation will likely prevail.

These rules of interpretation will not apply in every circumstance in which an academic policy is challenged. However, one or more may be factors that the court weighs when considering how to interpret the contract language in the college catalogue, and the individual facts and context of each academic challenge will likely trigger the use of the various rules of interpretation, and thus make the determination of whether a breach of a term occurred at all a very fact-sensitive endeavor for the court.

*6. Summary of a Contract Theory of Liability.*—In summary, it is "black letter law" that a university catalogue, bulletin, or other such formal document helps to define the nature of the contractual relationship that exists between the university and a student.[122] On the other hand, an institution may retain a largely free hand if it takes the precaution of inserting a disclaimer in the catalogue stating that the institution reserves the discretion to make changes in academic regulations and course requirements from time to time. In such instances, the courts may not conclude that a student has an entitlement to be governed by the precise terms of the rules and regulations in effect at the time of matriculation.

On the other hand, the court may not necessarily conclude that every one of the university's obligations are discharged due to its disclaimer, especially if the court determines the disclaimer is of the boilerplate type that would only deprive the agreement of any substance at all. In that case, the court may endeavor to determine the true agreement between the university and student, using the common rules of contract interpretation to aid in that determination. In that instance, the determination of whether a breach of a term occurred may be more fact-sensitive, as each term must be determined in the context of the particular student-university relationship. Moreover, the specificity of the terms in the catalogue and the course of performance between the parties up to the time of the academic policy modification may be considered.

In an effort to safeguard academic freedom and discretion, many courts are reluctant to apply commercial contract principles across the board to the university-student relationship. At the same time, many courts have also recognized that the old doctrine of *in loco parentis* is not feasible any longer, and

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121. *See* MURRAY, *supra* note 69, § 88(G).

122. Vidor v. Peacock, 145 S.W. 672, 674 (Tex. Civ. App. 1912) (stating that the act of enrolling a student in school constitutes acceptance of a contract governed by terms embodied in school catalogue). Courts have sometimes been willing to hold both institutions and students to the terms of such publications. Tex. Military Coll. v. Taylor, 275 S.W. 1089, 1091 (Tex. Civ. App. 1925) (holding conditional verbal contract between student and school is binding despite unquestioned validity of legal proposition that catalogue constitutes written contract between educational institution and patron when entrance is under its terms).

have applied contract law in many situations. However, courts still largely defer to the institution of higher education where they deem the issue is better characterized as an academic matter.[123] Though historically accorded to institutions of higher education, this judicial deference is misplaced, and courts should not hesitate to intervene on behalf of student claimants. Institutions of higher education are becoming more commercialized in nature all the time, and no longer maintain the same status they did during Colonial times when the doctrine of *in loco parentis* was the legal rule applied to student-university disputes. Indeed, the academic expectations of both students and universities concerning their obligations to each other no less than demands that courts extend their willingness to depart from their deferential position and hear student academic claims. Furthermore, the court has many tools at its disposal to adjudicate these student claims, and there is no reason why the university should be afforded a unique position.

### *B. Estoppel Theory*

Action brought under a theory of estoppel is another way students may challenge academic and nonacademic decisions of the institutions of higher education that they attend. "The purpose of contract law is often stated as the fulfillment of those expectations induced by the making of a promise."[124] While the expectation interest has been recognized as the normal interest protected by contract law, it is also true that the reliance interest presents a greater claim to protection.[125] If a party has reasonably relied to her detriment on the promise of another, that party has suffered a loss which is an out-of-pocket quantity. In such an instance, estoppel theory reasons that the relying promissee is obviously injured, even without the strict adherence to the existence and breach of a contract, since the promisee has already suffered a measurable loss when the promissor refuses to perform.[126]

In order to succeed under an estoppel theory, section ninety of the *Restatement (Second)*[127] explains that there must be a promise[128] which the promissor must reasonably expect to induce reliance, and the promisee (or even a third party under the *Restatement (Second)* version) must actually rely.[129] The

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123. *See* Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975).

124. *See* MURRAY, *supra* note 69, § 66(A).

125. *Id.*; *see also* Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936).

126. MURRAY, *supra* note 69, § 66(A).

127. Note that both Restatement and Restatement 2d are very similar, except for their provisions regarding partial enforcement.

128. McCroskey v. State, 456 N.E.2d 1204 (Ohio 1983). Some courts are willing to apply the doctrine where the promise and the details of the arrangement are not definite enough to be enforced if consideration had existed. *See* Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267 (Wis. 1965).

129. *See, e.g.*, Landess v. Borden, Inc., 667 F.2d 628 (7th Cir. 1981).

*Restatement (Second)* differs from the first *Restatement* in one important regard: it created a flexible remedy that would permit either full or partial enforcement of the promise.[130] Using this seemingly small change, courts have used the estoppel device much more liberally, not limiting the device to the particular fact situations. For example, the theory can be found in various cases such as promises made by employers,[131] franchisors,[132] leases,[133] stock acquisitions,[134] and many other matters originally thought to be only matters of contract.[135] With this increased recognition of estoppel theory, the promissee may seek to have the promissor estopped after detrimental reliance can be shown; furthermore, the promissor is estopped to the degree that would make the relying party whole, which in many cases turns out to be in fact the expectation interests.[136]

Student plaintiffs have scored several victories using estoppel claims. Under an estoppel theory, a student-plaintiff argues that a professor or university administrator made a specific representation about graduation requirements, testing criteria, or other requirements. Accordingly, though the representations may have been inconsistent with the university's *actual* rule, since the student acted in detrimental reliance on the accuracy of the professor's or administrator's statement, the university is bound by the substance of such representation and is estopped from requiring that the student comply with the actual rule. Several cases demonstrate how an estoppel claim may be asserted, and indicate those factors which support an estoppel.

*1. The Estoppel Cases.*—One student success in an academic challenge based on estoppel theory is found in *Blank v. Board of Higher Education.*[137] In that case, an academic advisor at Brooklyn College told an undergraduate student that he was eligible to participate in an accelerated curriculum. In addition, the chairman of the student's department advised the student that he could take the two remaining major courses he needed at Brooklyn College without attending classes.[138] However, after the student satisfactorily completed the courses, the student learned that the college was going to deny him a bachelor of arts degree because he had not attended classes for the two courses he took.[139]

The president of Brooklyn College testified that the actual rule was that the

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130. *See* Reporter's Note to Restatement 2d § 90. The change was fostered by Professor Corbin who emphasized the origin of the action where damages were measured by the extent of reliance injury rather than by the value of the promised performance.

131. Div. of Labor Law Enforcement v. Transpacific Transp. Co., 69 Cal. App. 3d 268 (Dist. Ct. App. 1980).

132. *Hoffman*, 133 N.W.2d at 267.

133. Kramer v. Alpine Valley Resort, Inc., 321 N.W.2d 293 (Wis. 1982).

134. Gruen Indus. v. Biller, 608 F.2d 274 (7th Cir. 1982).

135. *See, e.g.*, Reeve v. Georgia-Pacific Corp., 510 N.E.2d 1378 (Ind. Ct. App. 1987) (discussing workmen's compensation benefits).

136. *See* MURRAY, *supra* note 69, § 66.

137. 273 N.Y.S.2d 796 (Sup. Ct. 1966).

138. *Id.* at 798-99.

139. *Id.*

college strictly enforced attendance requirements and did not grant credit for courses taken without attendance in class.[140] The court found that the student-plaintiff acted in reliance on the counsel and advice of administrators of the college,[141] and that the student spent time, money, and effort taking the recommended courses and completing them.[142] Because the student's claim satisfied all the elements of an estoppel claim, and because the student satisfied all the requirements for a Brooklyn College Bachelor of Arts degree, the court found in his favor and directed the college to confer upon Blank his degree.[143]

The court also made one other noteworthy finding: the president's statements were based on a Brooklyn College schedule of classes which became effective on the 1966-68 college bulletin, which was issued *after* the year the student-plaintiff enrolled for the two courses at issue.[144] This finding shows that at least one court thought it most equitable to evaluate a student's obligations as of the date of his matriculation, which was evaluated in this case by the explicit statements contained in the catalogue in place when the student-plaintiff matriculated. In sum, the court's holding in this case turns on the student's reliance to his detriment on specific representations made by agents of the college, but the court also indicates that the representation needed for a successful estoppel claim could also be found in the catalogue under which a student matriculates.

In *Healy v. Larsson*,[145] the student-plaintiff consulted with the dean, the director of admissions, the acting president, a guidance counselor, and the mathematics department chairman to establish a course of study leading to graduation. Even after the student successfully completed the subjects recommended to him, the school denied him the associate of arts degree because he failed to take the proper number of credits in his "concentration."[146] Following the example set forth in *Blank*, the court held that the student had satisfactorily completed a course of study at the community college as prescribed by authorized representatives of the college, and therefore ordered the college to grant the student the associates degree.[147]

The court in *Olsson v. Board of Higher Education of New York*[148] reached a different result. In that case, at a review session for an examination, one of the student-plaintiff's professors misinformed the student that he would have to pass three out of five questions on the test, when the college actually required its

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140. *Id.* at 800.

141. *Id.* at 802.

142. *Id.*

143. *Id.* at 802.

144. *Id.* at 800.

145. 323 N.Y.S.2d 625 (Sup. Ct. 1971), *aff'd*, 348 N.Y.S.2d 971 (App. Div. 1973), *aff'd*, 318 N.E.2d 608 (N.Y. 1974).

146. *Id.* at 626.

147. *Id.* at 627.

148. 412 N.Y.S.2d 615 (App. Div. 1979), *rev'd*, 402 N.E.2d 1150 (N.Y. 1980).

students to pass four of the five questions.[149] The actual rule was not written in any of the university's regulations or handbooks.[150] On the test, the student passed under the erroneous criteria (three of the five questions), but did not pass under the school's actual criteria for passing (four of the five questions). Despite the detrimental result to the student, the court found that the college manifested its good faith because it offered the student the opportunity to retake the examination.[151] Moreover, it would be pure speculation to argue that the student might have passed the examination even if he had known the actual rule. Thus, the court concluded that if it found for the student, then it would be interfering with the academic judgment of the faculty at the school.[152]

While estoppel claims have been rarer than contract claims in academic challenge cases, Blank and Healy represent the manner in which successful estoppel theories may be utilized for academic challenge cases by student-plaintiffs. Important qualifications seem to emerge from the cases: in both, the academic record of the prevailing student was strong and unquestioned. While there was no question about the student's academic competence in *Blank*, the same could not necessarily be said about the student in *Olsson*, who might have failed the examination even if he had not heard the professor's misstatement.[153] Further, the dispute over whether a diploma was due did not relate to the quality of the student's academic performance, but only whether the school should be bound by its own representations concerning the rules on discretionary matters such as class attendance policy and courses required for graduation.[154]

*2. Estoppel Applied to Academic Policy Changes.*—The principles of estoppel claims as described in these cases may be indicative of how a court would evaluate a student-university conflict where the university has changed its position regarding academic policies. For an estoppel claim to succeed, representations about policies or criteria made by the university must have been inconsistent with the university's *actual* alleged policies or criteria; additionally, the student must have acted in detrimental reliance on the accuracy of the misrepresented policy or criteria. If these representations are made and the student detrimentally relies on them, then the university is bound by the substance of the representation and is estopped from requiring that the student comply with the actual rule.[155]

First, the student-plaintiff must rely on her university's statements to her detriment. As the court in *Blank* noted, the university's misrepresentation can be

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149. *Id.* at 616.

150. *Id.*

151. *Id.* at 617.

152. *Id.*

153. *Id.*

154. *Id.* Thus, it is apparent that when faculty advisors misinform students about critical academic requirements, their misstatements may in some cases create both estoppel and contract claims against the university.

155. Blank v. Bd. of Higher Educ., 273 N.Y.S.2d 796 (Sup. Ct. 1966).

found in the catalogue under which a student matriculates.[156] In an academic policy estoppel case, the *actual* rule is the modified policy or criterion, such as newly required courses in a particular major, changes in the number of credit hours needed for graduation, changes in the grading system, and the academic standards for honors, scholarships, and sports participation.[157] The *misrepresented* rule is the policy or criterion that was stated to the student either before or after the actual rule went into effect. As soon as the student makes a decision based on the misrepresented rule and the university imposes its actual rule on the student, placing that student in a worse position than she would have been in if the misrepresented rule had actually been in place, the student successfully shows detrimental reliance.[158]

Proving the existence of both the misrepresented rule and the actual rule necessary for a successful estoppel claim may be met rather easily if the college makes its policy change in one of its printed publications, such as its student catalogue. However, there are still two hurdles that the student must overcome in order to prevail: the student must demonstrate actual reliance and must establish that the university was not engaging in employing its academic discretion.[159]

In order to clear the first hurdle, the student must be deemed to have actually relied on the university's misrepresented rule. What constitutes actual reliance? In *Olsson*, the student relied when he took an examination, a one-time effort.[160] In *Blank*, the student had begun and had completed his educational program at his college.[161] In *Healy*, the student had begun the program at his college, but had not yet completed the program.[162] In order to have detrimental reliance, the student must have made a commitment to begin what she believed to be her part of the bargain, and have begun reliance by acting on that decision.[163] In situations where academic policies have been altered, there are two approaches. First, at one end of the spectrum, reliance could be deemed to exist once the student has begun the academic program. Second, at the other end of the spectrum, the student could be deemed only to have relied upon that portion of

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156. *Id.* at 800.

157. *See, e.g.*, ANDERSON UNIV., CATALOGUE (2000-02), at 37, where the catalogue dictates modified grading policies.

158. Detrimental reliance is not measured in magnitude, but mere status, especially concerning those matters which are subjectively valued in nature. *See* MURRAY, *supra* note 69, § 66.

159. *See id.* § 66(D).

160. 412 N.Y.S.2d 615, 616 (App. Div. 1979).

161. 273 N.Y.S.2d at 800.

162. 323 N.Y.S.2d 625, 626 (Sup. Ct. 1971).

163. Notice that the student, like in *Healy*, need not actually complete reliance. *See* MURRAY, *supra* note 69, § 66. The application of the actual reliance is not strict. In fact, promises are generally enforceable where commitments are made in furtherance of economic activity, regardless of whether there was any bargained-for-exchange; applied here, students must not show any bargained-for-exchange, but a mere commitment to hold up their end of the bargain promised by the college.

the program that she has completed, such as enrollment for one particular semester. Clearly, whether the student actually relied on any specific policy will be very fact-sensitive. For example, a change in program requirements, such as the number of hours needed to graduate, is more likely to be viewed under the former interpretation, whereas a change to the requirements under which students receive academic honors may be more appropriately viewed under the latter interpretation. The *Restatement (Second) of Contracts* indicates a preference for the former interpretation through its use of partial performance, provided that the promissee can show at least some minimal evidence of detrimental reliance.[164]

The second hurdle a student must overcome is to show that her reliance was not purely academic in nature. As explained in *Olsson*, the modified or actual rule may be imposed regardless of the student's reliance on another rule if that imposition reflects the academic judgment of the faculty that the student possesses the necessary skills to achieve an end which the actual rule does not actually prohibit.[165] Therefore, whether an estoppel claim will succeed turns on whether a court deems the particular case as academic in nature (in which it would likely follow the court in *Olsson* and defer to the judgment of the institution) or administrative or non-academic in nature. It is clear that performance on an exam is purely academic in nature (*Olsson*), while residence requirements (*Blank*) and required courses for a program (*Healy*) are non-academic. Though this will be discussed in more detail later,[166] suffice it to say that it may be this precise distinction may determine whether or not a particular estoppel claim brought by an aggrieved student will prevail in court.

*3. Estoppel Theory Summary.*—In conclusion, in deciding whether or not an estoppel claim will succeed, the court may need to determine first whether a particular issue is more appropriately characterized as "academic" in nature, and thus left to the institution, or whether the issue is more appropriately characterized as a discretionary matter, where the courts have had no problem interfering with the decisions of institutions whenever the student has actually detrimentally relied on misrepresentations regarding a policy by the university.

### *C. Quasi-Contract and Implied-in-Law Theory*

A student may also challenge an academic policy decision under a theory of quasi-contract and implied-in-law contract. This approach, characterized as a judicially-defined relationship and examination of good faith and fair dealing, allows the court to balance student expectations and university fiscal interests.[167] The quasi-contract and implied-in-law contract approach protects both student

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164. *See supra* note 130.

165. *See Olsson*, 412 N.Y.S.2d at 616.

166. *See infra* Part III.B.

167. This approach is not purely a quasi-contractual approach, though the court labels it as such. Quasi-contract actually results in a restitution remedy, where the court returns to the prevailing students those payments they made to the school, on the theory that the school received an undeserved benefit, having failed to meet its obligations to the students.

interests and the university's need to respond to academic market demands. By relying on custom and practice in higher education to determine the appropriateness of the university's decision to change a particular academic policy or program, a reviewing court may attempt to avoid judicial legislation while simultaneously avoiding the unfairness of excessive deference.[168]

*1. Beukas v. Board of Trustees of Fairleigh Dickinson University.*—The court in *Beukas v. Board of Trustees of Fairleigh Dickinson University* approached a student suit under the quasi-contract and implied-in-law theory.[169] The case offers a framework that allows courts to examine decisions made by colleges to change programs by balancing competing interests. When Fairleigh Dickinson University decided to close its dental college, degree candidates were disappointed. The university maintained that the decision was due to a financial necessity caused by the withdrawal of state aid.[170] The university set a closure date, suspended the enrollment of new students, and developed a process to phase out the dental program that allowed upper-class students to remain at the university until graduation.[171] The school also addressed affected students by assisting those students' transfers to dental schools in neighboring states, and even allowing each individual student the choice of immediate transfer or transfer at the closure of the university's program.[172] Lastly, the school ensured that its accreditation would remain intact through closure.[173] Despite all of these measures, the injured students filed suit.[174] The student-plaintiffs claimed that representations in the university's publications created a contract that the institution would remain functional until the completion of their degree programs.[175]

The *Beukas* court recognized that some discretion must be given to institutions making an administrative decision to terminate an academic program on the grounds of necessity.[176] The court considered how much protection

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168. This theory, which the court likely erroneously labels here as quasi-contract, is a good example of Ian Macneil's relational theory of contracts. *See* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978). Macneil suggests that there are particular types of arrangements for which pure contract law does not work: typically those relations with traits such as complexity, multiple parties, increased duration, lack of discreteness, and interdependent obligations. There is a point at which the relation has become essentially a minisociety with a vast array of norms beyond those contemplated by contract law. *Id.* at 878. The student-university relationship may fall squarely into Macneil's relational theory.

169. 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

170. *Id.*

171. *Id.* at 778-79.

172. *Id.* at 779.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 781.

detrimentally-affected students deserve under circumstances where the university has unilaterally changed student academic programs or policies, and more specifically, under what circumstances the university may decide to terminate an entire college for financial reasons. The *Beukas* court also noted that the university-student relationship is complex and that many different interests are at stake in each of the university's decisions, and then declared that the university-student relationship is inadequately defined by contract doctrine.[177] Rather than an express or an implied-in-fact contractual theory, the court understood the relationship as quasi-contractual, or implied-in-law.[178] The university-student contract is one of mutual obligations implied, not in fact, but by law, and it is also quasi-contractual in nature, created by law, for reasons of justice without regard to expressions of assent by either words or acts. The creation of an implied-in-law contract allows recognition that the student-university relationship carries vestiges of status, not just that of contract.[179] Others agree that many modern contracts embody complex relationships and carry elements of both custom and status.[180]

The *Beukas* court concluded that the students were entitled to expect the university to act in good faith and to deal fairly with them in accordance with this "law-defined" relationship.[181] The court went on to hold that the college did not act arbitrarily or in bad faith, that the students were given adequate notice, and that the college showed good faith in arranging transfer students to other dental schools.[182] Ultimately, the court concluded that, under these circumstances, any loss or detriment suffered by plaintiffs cannot be said to have been unjustly caused by defendants.[183]

*2. Application of* Beukas *to Academic Policy Changes.*—Applying *Beukas* to claims by students of changes in academic policy, the court's framework remains a good guide to balance a university's obligation to treat students fairly with the other important societal interests served by a university. The two-part test emerging from the case consists of: (1) whether the university demonstrated good faith in reaching the decision to implement program closure; and (2) whether the university dealt fairly with students in light of the decision to close the program.[184] The first question balances societal interests in protecting the institution against student interests. The second question recognizes and defines the university's obligations to its students.

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177. *Id.* at 782.

178. *Id.* at 783-84.

179. *See also* Napolitano v. Princeton Univ. Trs., 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982) (explaining that the relationship between student and university cannot be described either in pure contractual or associational terms).

180. *See* HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 25.03 (1987) (commenting on the transition from a status and custom based society to one based largely on freedom of contracts).

181. *Beukas*, 605 A.2d at 784.

182. *Id.*

183. *Id.*

184. *Id. See also* MURRAY, *supra* note 69, § 66(D).

Applying the first part of this test to academic policy changes, it is clear that an administrative decision is of such significant import that the decision deserves a careful, deliberative process and an application of carefully-drawn criteria. These standards are expressed in the literature of higher education, and these same standards should form the basis to test good faith.[185] There are numerous factors to consider when deciphering what the standards in a particular case should be and what facts tend to satisfy the university's burden.

Some of the questions include the following: Did the process include collaboration and deliberation or was the university's action arbitrary? Were other alternatives that would cause less disruption to students fairly considered and rejected? Drawing on the literature of higher education, did the university exercise sound judgment in reaching its decision? When the court considers whether the university developed and fairly applied its articulated criteria to its decisions, the court has a prepared framework by which to test the university's good faith.[186] In this case, if a university proposes academic policy changes via an established and reasonable process, such as faculty committee voting procedures, the first part of the *Beukas* test will likely be easily met.

However, making the decision to change an academic policy in good faith only satisfies one part of *Beukas*. Applying the second part of the *Buekas* test in academic policy changes requires that the university deal fairly with its affected students. Questions that may be relevant when considering this part of the test include the following: Did the university take steps to ameliorate the impact on affected students by assisting them in achieving their educational objectives despite the change? Did the university keep students informed and provide them with timely information so that students might take appropriate steps to protect themselves? For example, the university in *Beukas* continued to provide sufficient resources to the program so that it could retain its accreditation until the last students graduated or transferred. Specifically in changed-academic policy cases, did the university offer its resources to ameliorate any harm caused to the student when that ameliorating action would not have been a burden to the university?[187] Under *Beukas*, the university can only be excused from the payment of money damages when students are treated fairly.

*3. Quasi-Contract and Implied-in-Law Summary.*—The quasi-contract and implied-in-law contract approach protects student interests beyond the semester for which tuition is paid, while still recognizing the university's need to respond to academic market demands. This approach is particularly powerful because it imposes an obligation upon college administrators to act with due care toward both students and the larger community and to stand ready to justify

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185. *See supra* notes 26, 37, 39.

186. *See* Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1 (1982) ("[T]he university should be considered a trustee for the public generally and the students, faculty, donors, and alumni particularly . . . .").

187. For example, did the university offer to treat different categories of students (such as those matriculating under different catalogues) differently with respect to a changed academic policy? Would the relative burden such as a software-update be significant?

administrative actions. By adopting this type of standard, courts merely ask that universities comport with the expectations and the standards articulated by educators and academic institutions. This standard allows courts to examine the conduct of the university and to ask whether it has acknowledged its many relationships during its decision-making process and has fairly balanced the many competing interests that are impacted by the decision to change a long-standing academic practice. This legal theory may greatly aid the courts; by relying on custom and practice in higher education to determine the appropriateness of the university's decision to change a particular academic policy, a court can avoid the unfairness of excessive deference.[188]

### *D. Possible Remedies in Student-University Challenges*

*1. Availability of Monetary Damages.*—The decision to alter an academic policy may be unanticipated and result in substantial burdens on students. Students choose schools for academic as well as social, economic, and reputational reasons.[189] Since college degrees, class rank, GPA, or future prospects are not fungible, students are understandably disappointed by injurious administrative decisions to alter academic policies that they expected to remain constant from the date of their matriculation. In some cases, students may be deprived of the opportunity to earn the GPA they could have earned, lose scholarship moneys, or lose minimum qualifications for participation in extra-curricular activities. Additionally, there simply may be no other acceptable alternatives for students when all similarly-situated institutions make the same academic policy changes.[190]

When students prevail, damage awards may be measured in several different manners: reliance, restitution, and expectation interests.[191] Under a theory of restitution, the court would return to the prevailing students those payments they made to the school, on the theory that the school received an undeserved benefit.[192] Using reliance interest analysis, the court would measure student injury in terms of losses suffered as a result of student reliance on a promise that the school would award a degree with final grades reflecting evaluation under standards in place at the time the student matriculated if the student fulfilled the school's requirements.[193] Less frequently, students may be able to show monetary expectation and consequential damages by proving the losses suffered

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188. The approach is also powerful because it empowers students with a right to challenge whether the decision is grounded in good faith.

189. *See* Meir G. Kohn et al., *An Empirical Investigation of Factors Which Influence College-Going Behavior*, Rand Report R- 1470-NSF Sept. 1974, at 23 (explaining role of cost in formulating college-choice model).

190. *See, e.g.*, *supra* notes 1, 2, 4, 14.

191. RESTATEMENT, *supra* note 71, § 344.

192. Behrend v. State, No. 80AP-328, 1981 WL 3591, at *3 (Ohio Ct. App. Nov. 12, 1981); RESTATEMENT, *supra* note 71, § 344.

193. Eden v. Bd. Trs. of State Univ. of N.Y., 374 N.Y.S.2d 686, 689 (App. Div. 1975).

as a result of delay or nonconferral of a degree.[194]

*2. Availability of Injunctive Relief and Specific Performance.*—When academic policy changes are made to a program, affected students may engage in activities to rally public support and dissuade decision-makers from their chosen course of action.[195] Although the best decisions come from collaborative decision-making by a broad community of voices, once an institution of higher education ultimately decides to change an academic policy, students and others who may seek injunctive relief to block the implementation infrequently succeed.[196] Even those courts recognizing a breach of contract and approving the award of damages to injured students reason that the students' remedies would be to seek damages for the actual harm that the students have incurred: the lack of their educational program as they believed it existed.[197] With respect to ordering specific performance or injunctive relief, many courts have been reluctant to take the management of the institution away from its administrators.[198]

However, judicial reluctance to order specific performance or injunctive relief is very likely ill-founded. Specifically, especially for courts following the model asserted in *Beukas* and quasi-contract approaches, student relief is mostly, if not only, beneficial when carried out, not when remedied through money damages. Additionally, true consequential and expectation damages are difficult to compute because it is nearly impossible to value future education, work, and school opportunities. Future opportunities are often speculative because the court does not know what decisions a student will make. Ultimately, injunctive relief may be the best type of remedy to satisfy injured students. Generally, specific performance and injunctive relief are appropriate where damages would not be adequate to protect the expectation interest of the injured party:

> Adequacy is to some extent relative, and the modern approach is to

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194. *See generally* Robert R. DeKoven, *Challenging Educational Fee Increases, Program Termination and Deterioration, and Misrepresentation of Program Quality: The Legal Rights and Remedies of Students*, 19 CAL. W. L. REV. 467, 483-87, 502-03 (1983) (noting the difficulty of determining damages due to failure of general terms, but relative ease of ascertaining damages where particular costs and foregone opportunities would certainly have not have accrued but for a particular decision by the college).

195. The "protest march and rally" remains an effective method for students to communicate their concerns. *See Alabama A&M Students Oppose Tuition Hikes*, CHRON. HIGHER EDUC., Apr. 10, 1998, at A8 (describing student rally to protest tuition hike and cutbacks, including faculty jobs and academic programs); *supra* note 13 and accompanying text for examples involving academic modifications.

196. When money damages will suffice for breach of contract, a court should not exercise its equitable power to order specific performance. RESTATEMENT, *supra* note 71, § 359(1).

197. *See* Behrend v. Ohio, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977).

198. *See* Soderbloom v. Yale Univ., No. CV-91-0324553-S, 1992 WL 24448, at *4 (Conn. Super. Ct. Feb. 3, 1992) (denying injunction to varsity wrestling team members when Yale terminated program).

> compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. Doubts should be resolved in favor of the granting of specific performance or injunction.[199]

A college career of academia, once interfered with by an unanticipated academic policy modification, cannot be easily rebuilt. Equitable remedies may be the only way to prevent such harm. If the university's decision to change its academic policies is not made appropriately, under whichever model a court chooses to adjudicate the student complaint, then the students, community, alumni, and donors will be unnecessarily harmed by judicial inaction. Courts should carefully scrutinize rather than shield the decision of an institution of higher education under a misguided concept of judicial deference.

## III. A PROPOSED ACADEMIC POLICY MODIFICATIONS MODEL

Injuries resulting from decisions to modify academic policies constitute the precise type of valid student claims which courts have increasingly recognized as appropriate to protect students and to ensure the viability of higher education altogether. Courts must find a comfortable and unobtrusive approach, with which to deal with academic challenges brought by students that acknowledges the consumer nature of the student-university relationship and that demands more accountability from the institution. Courts should not meddle with an institution's academic judgment, but should review academic challenges with close scrutiny to avoid harsh results for students who rely on promises which the institution itself has used to entice the students' business.

In Section A, this Part recommends that courts evaluate student claims under a contract theory because that theory would afford students the most protection while not interfering with the institution's academic judgments. There is no reason why contract law cannot safeguard an institution's ability to maintain academic standards while simultaneously protecting students' expectations. In Section B, this Part recommends a possible model upon which courts may draw to some extent to evaluate student claims involving academic policy modifications to achieve the fairest remedy possible.

The judicial deference historically accorded institutions of higher education making academic policy modifications is misplaced, and courts should not hesitate to intervene on behalf of student claimants. The preceding section shows that courts have already recognized the validity of student suits under theories of contract, quasi-contract, and estoppel regarding many types of student-university disputes. This is in large part due to the changed expectations of the parties, reflecting economic and academic pressures. However, it is also apparent that most, if not all, of the protections afforded students have turned on the willingness of courts to shed the deferential treatment historically accorded to educational institutions. As explained in Part I of this Note, courts should not defer to institutional decision-making in all academic policy modification cases

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199. RESTATEMENT, *supra* note 71, § 359 cmt. a.

today because universities implore marketing practices and are consumer-oriented, and thus do not deserve any unique judicial protection.

### *A. Legal Theory*

Each theory discussed in Part II has its own advantages and disadvantages as far as proving the necessary elements to succeed and the type of remedy available. Though the establishment of a contract between the university and student is not very difficult to show, interpreting the precise terms of that agreement to determine whether a breach has occurred may be a very fact-sensitive endeavor, possibly involving application of many rules of contract interpretation, such as the ones discussed in Part II.A. of this Note. An estoppel claim may be easier to prove if there are specific representations and the student can show detrimental reliance; in that instance, the court might not need to delve into the interpretation of terms in the catalogue to determine the precise degree of protection the student should be afforded. Of course, if the contract terms can be proved, a breach of contract claim would theoretically accord the injured student more protection because her damages would be expectation interests rather than reliance interests.

My preference is to base the law governing student-university disputes squarely on contract principles because that theory would afford students more protection as well as expectation damages. Some advantages of this approach would be to produce a uniform standard applicable to both large and small institutions, to reduce doctrinal ambiguity (the same rules of interpretation must apply in all types of cases), and to establish unequivocally the principle that all students in higher education, including both those that could show great reliance and those who have just begun their academic careers, have certain basic expectations and entitlements contingent on successful completion of their studies. Additionally, contract law has been a sufficiently flexible doctrine to adjudicate disputes among people in very complex relationships where many expectations are unstated, such as relationships among family members, physicians and their patients, and in long-term, complex commercial relationships.[200] If contract law is so flexible that its principles have been deemed proper to protect the interests of both parties in these complex situations, there is no reason why contract law cannot also afford universities and students equally acceptable protections, especially in light of the commercial nature of higher education today.[201] The university does not stand in a "unique" position in comparison to other industries and should not be treated as if it does.

It is true that a number of courts have hesitated to apply strict commercial contract principles to the academic arena.[202] There is, however, no reason why an academic contract law, which safeguards an institution's ability to maintain academic standards while simultaneously protecting students, is not feasible. In

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200. *See supra* note 22.

201. *See supra* Part I.

202. *See* Slaughter v. Brigham Young Univ., 514 F.2d 622, 627 (10th Cir. 1975).

fact, as the discussion of contract claims above demonstrates, it is entirely possible for courts to interpret the terms embodied in the student-university contract, deciphering the terms that are sufficiently specific to bind both parties, treating boilerplate clauses that renounce all liability with suspicion, and taking note of the university's and student's prior conduct.[203] Thus, by virtue of matriculating, paying tuition and fees, and expending time and effort on the course of study, the student has a contractual right to be judged fairly, accurately, and consistently by the university in compliance with the institution's own rules.[204]

The students' contract rights with respect to academic evaluations and assessments is not equivalent to a democratic right of students to collaborate in setting academic standards, nor an absolute right to enrollment or unwavering evaluation regardless of academic performance.[205] The faculty must retain that power if academic freedom is to be safeguarded.[206] It is true that there are students whose academic achievement is totally inadequate, whether because of insufficient aptitude, lack of application, or nonacademic problems. To maintain the university's academic standards, such students must be evaluated by those in the best position to judge academic performance.

### *B. Which University Decisions Are Properly "Academic"?*

This Note addresses how student claims regarding student-university academic policy disputes should be handled. Whether a court chooses to hear the merits of a particular student claim, under contract, estoppel, or quasi-contract and implied-at-law contract theories, turns on whether the court believes that the university's decision is an academic judgment or a nonacademic judgment.[207] Unquestionably there is a legitimate place for judicial deference to decisions made by educators, particularly those decisions that are purely academic in substance. On the other hand, some policies are only "academic" by a university's own designation, but actually reflect policy choices made by administrators or faculty, and do not endeavor to evaluate student academic

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203. *See supra* Part II.A.3.

204. *See supra* note 42.

205. *See* Marquez v. Univ. of Wash., 648 P.2d 94, 96-97 (Wash. Ct. App. 1982) (affirming dismissal of student who failed to meet minimum academic standards despite breach of contract claim asserting that school failed to provide structured or mandatory tutorial assistance program).

206. *See* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter and Harlan, JJ., concurring) ("'The four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

207. Note that the question whether a decision is academic or not does not arise at all in the discussions involving boilerplate clauses, unconscionability, the catalogue as the primary source, specificity of terms, or subsequent conduct of the parties, indicating that contract theory would likely provide students more protection than the other theories. Also, students may recover under estoppel even if the promise involved a purely academic decision.

performance whatsoever. For example, no one would consider a decision to repave a school parking lot or a modification of the school's fee policy for parking violators to be academic decisions, even though universities make those decisions. Thus, though there is a place for judicial deference in academic cases, judicial intervention may also be needed when the policy modification is not academic in nature.

As applied to student evaluations, the term "academic" may encompass a very broad range of matters. It can be used to describe virtually *any* report or evaluation of a student, such as those dealing with plagiarism and cheating on examinations, violation of disciplinary rules, failure to pay tuition, excessive absence from classes, or failure to comply with registration forms and technicalities. It is obvious that not all "academic" decisions by professors and administrators deserve judicial deference, and courts have the competence to distinguish when intervention is warranted to promote fairness in many student cases. Accordingly, it is necessary to break down the broad "academic" category into its component parts and to analyze where, and to what extent, judicial intervention is warranted.

*1. The Pure Academic Decision.*—The purest example of an academic decision is the professor's academic role of grading student examinations, papers, and class performance.[208] Justice Rehnquist stated the obvious concern in *Horowitz*—that a professor's decision regarding the proper grade "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."[209] It is obvious that a third party without expertise in the subject matter of a course is incapable of assessing a student's performance on an examination. The need for judicial deference to academic evaluations and decisions is at its maximum in a pure academic decision.

Generally speaking, modified academic policies do not fall into this category of decisions made by educators. Policy changes do not involve evaluating any particular student's performance academically. Of course, the policy may set guidelines and standards to be used for aiding student evaluations, but those types of decisions do not appraise a student's academic performance and may more appropriately be characterized as policy determinations about which reasonable educators may differ.

*2. The Marginally-Academic Decision.*—Less deference is due to an institution's decision in instances in which professors or administrators aggregate the evidence and information constituted by grades and other academic impressions concerning students to determine whether the students should be promoted or graduated. Such decisions made by a university most often consist of numerical data averaging, and those making such decisions may be registrars,

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208. Of course, grading is not capable of being utterly objective. On the boundary lines between grades, there is a "more likely than not" belief that an examination being graded deserves one grade rather than another. Indeed, greater demand for precision and accuracy in grade determination likely indicates that a higher portion of grades are questionable.

209. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978).

department chairs, or other professors who have not had the student in class.[210] Of course, such decisions are rarely pure calculations, and courts may thus exercise some degree of caution before concluding that the denial of a benefit to a student was a violation of the student's protected rights under either a contract, estoppel, or quasi-contract and implied-in-law claim. Despite this caution, if incongruent treatment of a student should occur, which cannot be explained on the basis of any relevant data, a court may conclude that such treatment violated the contract, quasi-contract, or estoppel rights of the student.

Policy modifications typically do not fall into the marginally-academic decision category. Policy changes do not involve evaluating any particular student's academic performance, no matter whether that evaluation is individualized in nature, as with the pure academic decision described above, or aggregate in nature. A difference exists between an academic policy modification and an academic decision based on aggregate evidence, and that difference should also provide guidance to the extent that a court is willing to lend deference to the institution's decision.

For example, suppose a scholarship program requires a recipient student to maintain a cumulative 3.00 GPA to continue receiving scholarship moneys. When the registrar's office calculates the student's cumulative GPA by aggregating the student's various course grades, it is making an entirely arithmetical calculation; it is not making an academic judgment. Therefore, if the university fails to calculate accurately, and the university refuses to change the student's GPA, certainly the student may ask a court to intervene and restore the student's promised scholarship. On the other hand, if the continuation of the scholarship funds also required satisfactory completion of a student thesis accepted by the department head, then the university is not making an entirely arithmetical calculation. The determination of satisfactory completion is an academic judgment. In that instance, the court should lend deference to the professor's academic determination if challenged.

Thus, although judicial intervention should not be frequent regarding marginally-academic decisions, courts should not hesitate to intervene where incongruent treatment of a student occurs which cannot be explained on the basis of any other relevant data, such as when a university denies a student scholarship funds on the basis of cumulative GPA calculated erroneously.

*3. The Non-Academic Decision.*—Another category of decisions exists that are not academic because they do not evaluate student academic performance at all. Those non-academic decisions are best characterized as policy decisions made by administrators and faculty about how their educational institutions should be managed. These decisions are characterized as those academic and educational policies about which reasonable educators can differ.

Again, suppose a scholarship fund requires a student recipient to maintain a cumulative 3.00 GPA and to receive a grade of B or better on a thesis to continue receiving scholarship moneys. The evaluation of the thesis is a pure academic

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210. Stoller v. Coll. of Med., 562 F. Supp. 403, 406 (M.D. Pa. 1983), *aff'd*, 727 F.2d 1101 (3d Cir. 1984).

assessment of the student's performance. The evaluation of the cumulative GPA is an entirely arithmetical calculation. However, the mere establishment of the scholarship's requirements does not evaluate the student recipient at all; in fact, it is likely that the criteria were established before any particular student received the scholarship award. The criteria were initially established entirely on the bases of reasonable educators' policy choices and judgments. Clearly, the mere fact that educators must make determinations regarding which categories of students should be rewarded does not indicate that they are actually evaluating the academic performance of a particular student. Thus, policy decisions requiring a particular GPA to receive honors, to receive scholarship moneys, or to participate in extracurricular activities or athletic programs are just that—policy decisions.

Other examples of such policy determinations include the following: should credit be denied for an excessive number of class absences, even if the student performs well on the final examination?[211] What GPA should be required for retention at each stage of the student's studies? How many credits should be required for graduation? Should D grades be given credit toward graduation and toward satisfaction of requirements in the student's major? Can and should students who score only marginally above the grade point average levels for automatic dismissal be dismissed as well?[212]

Is a newly-imposed plus-minus grading scheme an academic evaluation? There is no question that the grading scheme guides professors' evaluations, but the policy in no way determines the proper grade for a student in her course or even aggregates the information constituted by other academic impressions concerning students to determine whether they should be promoted or graduated. In fact, the modification of the grading scheme is precisely the type of decision that is characterized as an educational policy about which reasonable educators differ.[213] The establishment of a university grading scheme is analogous to the establishment of scholarship requirements in that educators determine criteria that they believe will serve the students' and the university's interests well. Any grading scheme is established entirely on the bases of reasonable educators' policy judgments. The idea that educators must make determinations about which categories of students should be rewarded (the new plus-letter grades) and punished (the new minus-letter grades) does not suggest that they are actually evaluating the academic performance of any particular student. In fact, those criteria are established before the students' academic performance is evaluated. Thus, academic policy modifications, including the implementation of plus-minus grading criterion, fall into the category of nonacademic decisions, and

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211. Blank v. Bd. of Higher Educ., 273 N.Y.S.2d 796, 802-03 (Sup. Ct. 1966) (holding that the college's absence policy was not academic, but a nonacademic decision, though made by educators).

212. *See supra* notes 1, 4 (demonstrating that reasonable minds in education can and do differ over the wisdom of newly-implemented academic policy modifications).

213. *See supra* notes 4-7, 9 (discussing faculty and other educators' disagreement as to the wisdom of a plus-minus grading system, and the benefits and shortcomings of such a system).

deserve the least amount of judicial deference because they do not evaluate the academic performance of students.

As noted in Part II, the terms of many academic policies are found in the college catalogue,[214] and students are expected to be evaluated according to those terms. It would be absurd to assert that a breach of those terms is an "academic evaluation" when those terms were implemented for the students' protection and inducement to attend the institution long before the student was ever actually evaluated academically. The decisions in this category, which are characterized as those academic and educational policies about which reasonable educators can and do differ, deserve the least amount of judicial deference because they do not evaluate the academic performance of students. Adoption of such an approach would not change the results in the great majority of cases, indicating that the expansion of judicial intervention in cases where an academic policy is modified is not a radical idea. The benefits, however, are abundant. Not only would it promote doctrinal uniformity, but it would also establish a firm contractual basis for all the rights to fair treatment which should inure to the student because of the time, money, and effort that the student expends on university education.

## CONCLUSION

The judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced, and courts should not hesitate to intervene on behalf of student claimants. Courts have already recognized the validity and utility of student suits under theories of contract, quasi-contract, and estoppel regarding many types of student-university disputes, in large part due to the changed expectations of the parties reflecting economic and academic pressures. Most, if not all, of the protections afforded students have turned on the willingness of courts to shed their deferential treatment accorded educational institutions.

Courts should not defer to institutional decision-making in academic policy modification cases today because universities employ marketing practices, are consumer-oriented, and do not deserve any "unique" judicial protection. Indeed, academic policy decisions constitute the precise type of valid student claims which courts have increasingly recognized as appropriate to protect students and to ensure the viability of higher education altogether. Moreover, academic policy decisions, such as implementing a modified plus-minus grading system, are nonacademic decisions about which reasonable educators differ; thus, academic policy decisions deserve the least amount of judicial deference.

Though some courts are understandably reluctant in certain cases to intervene in university-student disputes, and they correctly note that it is inappropriate to substitute their own judgment for the institution's academic and management decisions, they nevertheless must find a comfortable and unobtrusive role that acknowledges the consumer nature of the student-university relationship and demands more accountability from the institution. After all,

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214. *See* Davenport, *supra* note 43; *see, e.g.*, *supra* notes 97-98.

students have foregone other opportunities and purchased an educational product based on representations that the institution made to induce them to enroll. If the consumer nature of higher education is ignored and the courts continue to accord institutions deference, students' expectation interests, and even their reliance costs, are not adequately protected.

The university-student legal relationship is complicated. Some aspects of the relationship resemble other types of commercial contracts; yet other aspects of the relationship reveal that the student-university relationship is status-oriented and described in associational terms. Courts have struggled with how to resolve conflicts that arise between students and universities. Courts that do not defer to institutional decision-making regarding academic policy modifications may rely on principles of contract and estoppel to evaluate student claims. It appears that contract law may safeguard an institution's ability to maintain academic standards while simultaneously protecting students' expectations. Courts should not hesitate to intervene on behalf of student claimants injured by academic policy modifications and set aside the judicial deference historically accorded to institutions of higher education.

# HOW TO DISCRIMINATE AGAINST OLD LAWYERS: THE STATUS OF PARTNERS, SHAREHOLDERS, AND MEMBERS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT WITH ADDENDUM DISCUSSING *CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C. V. WELLS*

PETER J. PRETTYMAN*

## INTRODUCTION

Imagine that a partner[1] in a law firm, organized as a professional corporation, is approaching his sixty-fifth birthday. He has been with the firm for many years and has had, and continues to have, an exemplary record of service. Accordingly, he exercises complete discretion over his daily assignments and work schedule. He takes a regular salary, but also receives additional compensation in the form of bonuses, based on the firm's revenue. He has earned the right to be involved in the management of the firm, which he exercises by voting in all shareholder meetings, but is not a member of the management committee, which handles decision-making for most operations of the firm. This management committee decides that it is in the best interests of the firm to institute a mandatory retirement age of sixty-five. Our partner is in trouble.

The Age Discrimination in Employment Act (ADEA)[2] was enacted to eradicate precisely the type of discrimination described above[3]—where the only

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1. In the context of a law firm, the term "partner" is typically used, rather generically, to identify an attorney who, by virtue of skill and/or experience, has risen to a level in the firm above that of the less experienced associate. Along with this title may or may not come additional power over day-to-day operations and/or additional compensation, often in the form of profit sharing. As this Note continues, it will be important to be able to make the distinction between such a senior attorney in one business form as opposed to another. Accordingly, with the exception of the introductory section, when this Note mentions a "partner" it will be in the context of a partnership; when this Note mentions a "shareholder" it will be in the context of a professional corporation; and when this Note mentions a "member" it will be in the context of a limited liability company.

2. 29 U.S.C. §§ 621-34 (2002).

3. It has been suggested by one learned faculty member that age discrimination is not really discrimination at all because it targets people who usually have both money and power. In other words, these are not the down-trodden masses. It is neither the purpose nor within the scope of this Note to discuss the necessity of the ADEA. Suffice it to say that Congress found such discrimination to exist and to be worthy of legislative action. It is my hope that the courts will never become a safe harbor for discrimination of any kind, and it is in such a spirit that this Note is written.

reason for termination is the age of the employee.[4] Despite the best of intentions, however, Congress managed to produce a piece of legislation which, on its face at least, fails to provide a workable definition for a key term.

Similar to Title VII of the Civil Rights Act of 1964[5] (Title VII), the ADEA only protects "employees" against discrimination by employers.[6] Predictably, the question of whether someone is an employee has been a hotly contested issue in the courts. As it is defined in Title VII[7] and other Acts,[8] "employee" is defined in the ADEA as "an individual employed by any employer."[9] A proper understanding of who qualifies as an employee under Title VII and the ADEA is important for two reasons. The first is that each of the Acts has a minimum threshold number of employees before an employer's actions may be scrutinized under the particular Act.[10] The second is to determine who is an employee and may, therefore, bring an action under the Act.[11]

One might think that Congress would ensure a clear definition of such an important term; however, courts have generally found little guidance in the definition of "employee" provided in the Acts.[12] Accordingly, several

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4. 29 U.S.C. § 621 (2002).

5. 42 U.S.C. § 2000e-2(a) (2002); *see also* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997) ("Although the language we have quoted speaks of "any individual," courts long ago concluded that Title VII is directed at, and only protects, employees and potential employees."); Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996).

6. 29 U.S.C. § 623(a) (2002); *see also* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) ("A plain reading of the [ADEA] indicates that its protection extends only to those individuals who are in a direct employment relationship with an employer, and that a claim under its provisions lies solely in favor of a person who is an employee at the time of termination.").

7. 42 U.S.C. § 2000e(f) (2002).

8. *See* National Labor Relations Act, 29 U.S.C. § 158(b)(4)(i) (2002); Fair Labor Standards Act of 1938, 29 U.S.C. § 203(e)(1) (2002); Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(f) (2002); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002(6) (2002); Family and Medical Leave Act, 29 U.S.C. § 2611(3) (2002); Americans with Disabilities Act, 42 U.S.C. § 12111(4) (2002); *See also* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 708 (7th Cir. 2002) (concurring opinion of Judge Easterbrook, discussing the definition of "employee" in the acts).

9. 29 U.S.C. § 630(f) (2002).

10. Title VII has a minimum threshold of fifteen employees. 42 U.S.C. § 2000e(b) (2002). The ADEA has a minimum threshold of twenty employees. 29 U.S.C. § 630(b) (2002).

11. It should be noted that this is a threshold question. If an individual does not qualify as an "employee" under the ADEA, then he cannot proceed with his claim. For example, in the opening hypothetical, if the partner is not an employee of the firm, his claim for age discrimination under the ADEA will be dismissed because he is not protected by the Act. Likewise, if the partner is deemed to be an employee, he has only been granted the right to proceed; he still must prove his case in order to win the claim.

12. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("ERISA's nominal definition of 'employee' . . . is completely circular and explains nothing.").

jurisdictions have interpreted the definition in ways that are different, and sometimes conflicting.[13] A review of the cases will show that, in the majority of jurisdictions, the courts would refuse protection to the partner in the opening scenario and he would simply be out of a job.

As the Baby Boomer generation ages,[14] yet continues to remain active in the workforce,[15] it will become more important for the courts to develop a unified interpretation of "employee" under the ADEA, as it relates to partnerships, professional corporations, and limited liability companies. The purpose of this Note is to propose a solution to the problem of defining "employee" under the ADEA in that context, which takes into consideration the purpose of the ADEA, while still allowing the courts opportunity to examine employee status based upon individual situations.

Part I of this Note examines the Age Discrimination in Employment Act, looking at the history and purpose of the Act. This section also examines the history and purpose of the Act from which the ADEA derived its definition of "employee."[16] In order to properly understand the problem and the various approaches of the jurisdictions, and to formulate a solution, it will be essential to have a basic understanding of the typical nature of partnerships, professional corporations, and limited liability companies. Accordingly, Part II provides a brief primer on those types of organizations. Part III then examines the various approaches currently used to determine if a claimant is an "employee." Finally, Part IV examines the necessity of a unified approach for determining employee status and proposes a solution which requires an examination of an individual's remuneration and management authority. This solution improves the current regime because it contains standards which honor the remedial purpose of the Act, while still allowing courts to make decisions on a case by case basis.

The Addendum, following the Conclusion, was added after the original writing of this Note to discuss the wide-ranging effects of the United States Supreme Court's opinion reversing the Ninth Circuit's decision in *Wells v. Clackamas Gastroenterology Associates, P.C.*[17] The Addendum also argues that because the Court's adopted test is very similar to the test proposed within this note and because the reasoning for a broad interpretation of the ADEA still applies, the standards for evaluation, proposed in this Note, are still applicable

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13. See Part III of this Note for a thorough explanation of the various approaches.

14. *See generally* Rudy L. Sustaita, *Bracing for the Second Boom: The Courts Prepare the ADEA for the Baby Boomers*, EXPERIENCE, Fall 2002, at 10 (noting that in three years, the ADEA will cover every Baby Boomer).

15. In 2001, there were 18,882,000 men and women over the age of fifty-four in the civilian labor force, making up 13.3% of the total civilian labor force. Of that figure, 97% were actually employed (18,307,000 individuals). The total population of this age group, including those not in the labor force, is 57,052,000. Those in the labor force make up 33% of this age group. U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment Status of the Civilian Non-Institutional Population by Age, Sex, and Race, available at* http://www.bls.gov/CPS/cpsaat3.pdf (Feb. 4, 2003).

16. *See* 29 U.S.C. § 203(e)(1) (2002).

17. 271 F.3d 903 (9th Cir. 2001).

and necessary.

Since *Wells* is now settled law, it may be tempting to skip ahead to the Addendum, but I urge you to read the entire Note. The critiques of the various approaches formerly used and the rationale behind this Note's proposed standards are vital to a proper understanding of the issue and how it should be addressed, even after *Wells*.

## I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The ADEA was enacted in an environment of social change. Through legislation, Congress sought to correct the ills it perceived in society.[18] With Title VII, Congress undertook the laudable effort of preventing discrimination in the workplace based on race, color, religion, sex, or national origin.[19] Conspicuously absent from the prohibitions of Title VII, however, was any protection from discrimination on the basis of age. In 1967, the ADEA was enacted to fill that gap.

At the time of enactment, the ADEA protected employees[20] between the ages of forty and sixty-five[21] from discrimination on the basis of age. The upper age limit was later increased to seventy[22] and has now been eliminated entirely.[23] The Act specifically prohibits an employer from refusing to hire or discharging any individual on the basis of age, reducing an employee's wages on the basis of age, or acting in any other manner which would have the effect of depriving or adversely affecting an employee on the basis of age.[24]

Because the Act only protects employees, it is important to determine who qualifies as an employee. In this respect, Congress was less than helpful. The ADEA defines "employee" as "an individual employed by any employer."[25] This definition was apparently a popular one to use, as it was also employed in numerous other Acts.[26] Unfortunately, the courts have recognized that the

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18. 29 U.S.C. § 621 (2002).

19. 42 U.S.C. § 2000e-2(a) (2002).

20. It should be noted that the language of the ADEA references "individuals," not "employees." However, courts have recognized that the Act only applies to "employees." *See* 29 U.S.C. § 623 (2002); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986).

21. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (amended 1978).

22. Age Discrimination in Employment Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, as amended by Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342.

23. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342.

24. 29 U.S.C. § 623(a) (2002).

25. *Id.* § 630(f).

26. *See supra* note 8.

definition is completely circular[27] and voluminous litigation regarding the definition of "employee" under the Acts has ensued.[28] Since the Act itself is not helpful in defining "employee," this Note first looks to the history and purpose of the ADEA in order to fashion a workable test for employee status.

Very little of Congress' intent can be determined from the legislative history of the ADEA itself. The sectional analysis of the Act, undertaken by the House of Representatives, discusses definitions, but "employee" is not among them.[29] Congressional debate focused on the desire to protect older workers from discrimination,[30] but it did not extend into a discussion of who should qualify as an employee under the Act.[31]

As courts have recognized, the prohibitions of the ADEA were taken "in haec verba" from the language of Title VII,[32] so it is also appropriate to look to Title VII's legislative history and the context within which it was adopted. Title VII's definition of "employee" was borrowed from a number of earlier acts, including the original wordings of the National Labor Relations Act (NLRA)[33] and the Fair Labor Standards Act (FLSA).[34] Such a sparse definition of the term was appropriate at the time because of the way the Supreme Court was interpreting the term "employee."[35]

In a series of cases considering whether individuals were independent contractors or employees under several similarly worded Acts,[36] the Court determined that employee status should be determined broadly "'in the light of

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27. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992).

28. For an example of the amount of litigation over this issue, run a search on any research service for ("ADEA" /p defin! /s employee).

29. Rebecca R. Luchok, *Coming of Age in the Professional Corporation: Liability of Professional Corporations for Dismissal of Members Under the Age Discrimination in Employment Act*, 48 U. PITT. L. REV. 1185, 1192 (1987).

30. *Id.*

31. *See generally* Congressional Debate on the Age Discrimination in Employment Act of 1967, available in the Congressional Record.

32. Lorillard v. Pons, 434 U.S. 575, 584 (1978).

33. National Labor Relations Act, c. 372, § 2, 49 Stat. 450 (1935) (defining "employee" as "any employee . . .").

34. 29 U.S.C. § 203(e)(1) (2002).

35. Note that the approach discussed, as it relates to determining the difference between employees and independent contractors, was later repudiated by the Supreme Court. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-25 (1992); *see also infra* notes 36-46 and accompanying text.

36. *See* NLRB v. Hearst, 322 U.S. 111 (1944) (establishing a broad test to be used in determining the difference between an independent contractor and employee under the National Labor Relations Act), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992); United States v. Silk, 331 U.S. 704 (1947) (applying the *Hearst* test to the Social Security Act); Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (applying the *Hearst* test to the Fair Labor Standards Act).

the mischief to be corrected and the end to be attained.'"[37] The test for employee status must include consideration of the circumstances of those workers who "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate [and who would be afforded relief by the Act]."[38]

In response to the Court's broad interpretation of the definition of employee, Congress either amended the statute to make the definition more restrictive,[39] or left it alone where the Court's interpretation presumably agreed with congressional intent.[40] Title VII's definition of "employee" was lifted from the FLSA;[41] one of the Acts which was not changed in response to the Court's action.[42]

Understanding the context and the origin of the definition itself, we should return to the history of Title VII. Again, the legislative history only provides limited insight into the definition of "employee," but the section-by-section analysis of the Act does indicate that "employee" should be defined "in the manner common for federal statutes."[43] In her article, Professor Nancy E. Dowd[44] theorized that this statement indicated that Congress intended that the same broad standard used in determining employee status under the FLSA was to be used for determining employee status under Title VII.[45] Accordingly, since the definition of "employee" used in the ADEA was taken from Title VII, the same argument could be extended to determining employee status under the ADEA.

Professor Dowd's argument, however, has been rendered moot. Several years after her article was published, the Supreme Court repudiated the broad approach employed at the time Title VII was adopted and held that, unless the statute clearly indicates otherwise, the common law principles of agency should be used to distinguish between independent contractors and employees.[46]

The foregoing discussion about determining the difference between independent contractors and employees has little to do with the status of

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37. *Hearst*, 322 U.S. at 124 (quoting S. Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

38. *Id.* at 127.

39. Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 92 (1984). *See also* Labor Management Relations Act, 1947, Title I—Amendment of National Labor Relations Act, § 101, 61 Stat. 137.

40. Dowd, *supra* note 39.

41. The ADEA defines "employee" as "an individual employed by any employer . . . ." 29 U.S.C. § 630(f) (2002). The FLSA defines "employee" as "any individual employed by an employer . . . ." 29 U.S.C. § 203(e)(1) (2002).

42. Dowd, *supra* note 39, at 93.

43. *Id.* at 90 (quoting H.R. 1370, 87th Cong. 2d Sess., *reprinted in* EEOC, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 2155).

44. *See id.* Professor Dowd's argument may now be outdated, but her article provides an excellent report of the history of Title VII and the context within which it was enacted.

45. *Id.* at 94.

46. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325 (1992).

shareholders or members as employees, but it does indicate that, at the time of enactment, Congress was desirous of a broad approach for determining employee status in a primary employment question of the day; the difference between independent contractors and employees. If nothing else, it is at least indicative of Congress' desire to protect as many workers as possible under the Acts.

It is difficult, if not impossible, to definitively determine congressional intent with regard to shareholders or members, because at the time of the enactment of the ADEA in 1967, the professional corporation was still in its infancy[47] and the limited liability company did not yet exist.[48] Congress could have had no idea of the hybrid business forms to come.

Before concluding the historical analysis of the ADEA and Title VII, there is one other detail worth mentioning. One particular comment by Senator Javits, which has been much cited in scholarly writings, does shed some light on whom Congress intended the Acts to cover. During debate over an amendment to Title VII, which would have eliminated doctors employed by hospitals from coverage under Title VII, Senator Javits argued in opposition to the amendment that to exclude professionals from the coverage of the Act would be to send a message to the minorities the Act was designed to protect that they just were not good enough to be a doctor or surgeon.[49] His comments provide no insight on the "employee" issue, but they do indicate that Congress did not wish to eliminate professionals from coverage under the Acts simply because they were professionals.[50]

## II. POPULAR BUSINESS FORMS FOR PROFESSIONALS

Since an examination of the history and context of the ADEA is only able to shed partial light on the subject, the courts have created several different approaches to determining employee status under the Act. Before proceeding to an analysis of those approaches, however, it will be necessary to have a basic understanding of the typical nature of partnerships, professional corporations (PC), and limited liability companies (LLC). It is not necessary to go into great detail regarding these business forms, but a basic understanding is necessary to follow several of the approaches taken by the courts.

### *A. Partnerships*

The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[51] Of particular note for our purposes is that the partners must be co-owners, because "ownership

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47. Luchok, *supra* note 29, at 1194.

48. 5 ZOLMAN CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING § 33.01 (2002) (noting that the first LLC statute was enacted in 1977).

49. 118 Cong. Rec. 3802 (1972).

50. The proposed amendment was never adopted.

51. 3 CAVITCH, *supra* note 48, § 12.01 (quoting U.P.A. § 101(6)).

involves the power of ultimate control."[52]

The existence of a partnership is determined under principles of state law.[53] There are several tests to determine the existence of a partnership, but they usually contain an analysis of the following elements: (1) whether the parties share in profits and losses; (2) whether the parties have common ownership over business property and are able to exercise control over that property; and (3) whether the parties exercise joint control and management of a business.[54] Once it has been determined that a partnership exists, the labels which the parties use to describe themselves and their awareness of the legal consequences of their association are irrelevant.[55]

Of the elements described above, the third element in particular is worthy of additional discussion. Courts have found that while there must be co-ownership of the business for a partnership to exist,[56] the actual management obligations need not be distributed equally.[57] In fact, an agreement to surrender control to a partner has been considered an exercise of the right to control.[58] Delegation of management authority alone, however, does not make a person a partner without the other elements of partnership status being present.[59]

### *B. Professional Corporations*

Prior to the establishment of the PC as a business form, professionals were prohibited from organizing themselves as a corporation.[60] The general ground for refusing incorporation to professionals was that they could not work for two employers, the corporation and their clients, at the same time.[61] Following extensive lobbying in the 1960's, however, the last barriers to the incorporation of professional service groups fell and state legislatures enacted professional corporation statutes.[62] All fifty states and the District of Columbia have enacted legislation governing professional associations and/or corporations.[63]

The PC is entirely a creature of statute; there is no common-law antecedent.[64]

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52. *Id.*

53. *Id.*

54. *Id.* § 13.05.

55. *Id.* § 12.01.

56. *Id.* § 13.05.

57. *Id.*

58. *Id.*

59. *Id.*

60. David R. Stras, *An Invitation to Discrimination: How Congress and the Courts Leave Most Partners and Shareholders Unprotected from Discriminatory Employment Practices*, 47 U. KAN. L. REV. 239, 242 (1998).

61. *Id.*

62. *Id.*

63. 6 CAVITCH, *supra* note 48, § 37.01. See note 3 in the source material for a listing of each jurisdiction's PC statute.

64. *Id.*

Unlike a partnership, which may exist even though the parties did not intend for one to exist, the PC must be created with the filing of articles of incorporation, just like any other corporation.[65]

At the time the PC statutes first came into existence, the main motivation for their passage was so that professionals could have the same tax benefits available to a corporation.[66] In addition, if a professional is practicing in a PC, rather than a partnership, he or she also has the ancillary benefit of a corporation's limited liability protection.[67] In a general partnership, the partners are jointly and severally liable for the actions of a fellow partner, whether they are business decisions or malpractice.[68] In a PC, on the other hand, the shareholders are shielded from that liability.[69] However, an individual shareholder is still personally liable for his or her own malpractice; the shareholder will not be shielded by the corporate entity.[70]

Another typical difference between a partnership and a PC is the way in which the participants are compensated.[71] In a PC, each of the shareholders takes a salary and may also receive additional compensation based on share ownership.[72] Meanwhile, any losses suffered by the PC will usually not be sustained by the shareholders individually.[73] Conversely, in a partnership, the partners will be liable for the losses of the partnership.[74]

One of the significant differences between a PC and a typical corporation, making the PC look more like a partnership, is the way the firm is managed.[75] One of the attributes of a corporation is centralized management.[76] Inherent in that attribute is the idea that control and management of the corporation rests in the hands of a group separate from the shareholders.[77] Because of the professional responsibility requirements of some professions,[78] professionals in

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65. *Id.* § 37.02.

66. Luchok, *supra* note 29, at 1194-95; *see also* 6 CAVITCH, *supra* note 48.

67. Stras, *supra* note 60, at 243.

68. *Id.* at 243-44.

69. *Id.*

70. 6 CAVITCH, *supra* note 48, § 37.03.

71. Stras, *supra* note 60, at 245.

72. *Id.*

73. *Id.*

74. 3 CAVITCH, *supra* note 48, § 13.05.

75. 6 *id.* § 37.03.

76. LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 133 (4th ed. 1998).

77. 6 CAVITCH, *supra* note 48, § 37.03.

78. *Id.* For example, in the case of attorneys, several of the requirements which may be violated by the management of an attorney by a non-attorney are: (1) the work of lawyers may not be directed by non-lawyers; and (2) the services of a lawyer should not be controlled or exploited by any agency intervening between lawyer and client. *See id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 5.4(d) (2002).

a PC cannot surrender control of the PC to one who is not a professional.[79] The result of this difference between the PC and a typical corporation is that the shareholders must be the ones directing operations of the firm and, in terms of management, the PC ends up looking very much like a partnership.

### *C. Limited Liability Companies*

Like a PC, the LLC is also a creature of statute, and a fairly recent one at that.[80] Also like a PC, and unlike a partnership, the LLC cannot come into existence informally; the appropriate filings must be made with the state before the LLC exists.[81] Very basically,[82] the LLC combines the tax benefits of a partnership[83] with the ability to fully participate in management, while still enjoying the limited liability afforded to a PC.[84]

This hybrid business form makes for complicated analysis as to whether it is more like a partnership or more like a PC. Because the business form is relatively new, there is very little litigation involving LLCs; however, as its popularity increases, the courts will almost certainly be faced with making that analysis. Nevertheless, there is one particular feature of many LLC statutes which may provide the turning point for analysis.

The default management form for a LLC is usually similar to that of a partnership; all of the members are equally involved in making management decisions.[85] At the formation of the LLC, however, the members may choose to allow a group of managers to control the operations of the firm, thereby more closely resembling a PC.[86] The type of management chosen and actually employed would likely be the most important factor in determining the status of members under the ADEA.[87]

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79. 6 CAVITCH, *supra* note 48, § 37.03.

80. The first LLC statute was adopted in 1977, but it was not until after 1988, when the IRS decided that LLCs should be taxed as partnerships, that states started widely enacting LLC legislation. The result of this rapid adoption of LLC statutes was that most states had already adopted their own code before there was a uniform LLC code. Accordingly, LLC statutes may vary widely from state to state; however, they all contain the above described attributes. As of 1997, all U.S. jurisdictions have adopted some form of LLC statute. *See* 5 CAVITCH, *supra* note 48, § 33.01.

81. *Id.* § 33.02.

82. This obviously brief discussion of the LLC is limited to the purposes of this Note.

83. 5 CAVITCH, *supra* note 48, § 33.01.

84. *Id.*

85. Alan R. Haguewood, *Gray Power in the Gray Area Between Employer and Employee: The Applicability of the ADEA to Members of Limited Liability Companies*, 51 VAND. L. REV. 429, 434 (1998).

86. *Id.* at 435.

87. *Id.*

## III. APPROACHES IN THE COURTS TO DEFINING "EMPLOYEE" UNDER THE ADEA

This Note specifically discusses the ADEA. However, in describing the various approaches to determining employee status, several cases examined below have discussed the definition of "employee" under Title VII or another similarly worded act. Courts have allowed that where the purpose of the legislation and the wording of the acts are similar, then decisions regarding one act may be used as persuasive authority for another act.[88]

It should also be mentioned that, unless noted otherwise, the approaches described below are used in the context of determining employee status for partners, shareholders, or members. A jurisdiction may use one approach for that purpose and another approach to determine the difference between employees and independent contractors. Even though the status of independent contractors is discussed in the context of congressional intent for the ADEA, it is not the purpose of this Note to discuss the status of independent contractors.

### *A. The Per Se Exclusion Rule for Partners*

Per se exclusion for partners is not so much a test as a general rule. Most courts which have examined the issue have determined that persons who are properly classified as partners are not protected by the ADEA or Title VII.[89] The rule has been justified on the grounds that a true partner is an owner, not an employee,[90] and Congress only intended the Acts to protect employees, not the owners of businesses.[91]

The primary concern with this rule is that it may be used blindly. Instead of undertaking a detailed analysis to determine if an individual is truly a partner or one in name only, a court may be tempted to summarily deny protection simply

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88. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); Wheeler v. Hurdman, 825 F.2d 257, 263 (10th Cir. 1987); Hyland v. New Haven Radiology Assocs., 794 F.2d 793, 796 (2d Cir. 1986).

89. *See Serapion*, 119 F.3d 982; Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996); Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859 (9th Cir. 1996); *Wheeler*, 825 F.2d 257; Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977); Simpson v. Ernst & Young, 850 F. Supp. 648 (S.D. Ohio 1994).

90. This approach is generally credited to the aggregate theory of partnership, which holds that a partnership does not exist apart from its partners. In other words, the partners are the partnership; therefore they cannot be employees of themselves. *See* Haguewood, *supra* note 85, at 438; Stras, *supra* note 60, at 258 n.38. It has been noted by at least one commentator, however, that the Revised Uniform Partnership Act (RUPA) has adopted the entity theory of partnership. *See* Stras, *supra* note 60, at 260. The entity theory of partnership holds that the partnership is a separate and distinct entity from the partners, more closely resembling the relationship between a PC and its shareholders. Under the entity theory, partners could be considered employees of the partnership. This may be an important argument to make in those states which have adopted the RUPA. *See id.*

91. *See Hyland*, 794 F.2d at 797.

on the basis of a title or form of business association.[92] As several courts have recognized, there is nothing in the ADEA or Title VII which specifically, or even inherently, denies protection to partners.[93] The analysis needs to focus on whether the individual is an owner or an employee.[94] If a person termed a partner does not exhibit the features of true partnership, then he or she should not be excluded from the protection of the Acts.[95]

### *B. The Economic Realities Test*

The original economic realities test was created by the Supreme Court in the context of determining the difference between an employee and an independent contractor under the NLRA.[96] The test was also later applied to the same issue under the Social Security Act (SSA)[97] and the FLSA.[98] Congress disagreed with the Court's broad interpretation of "employee" under the NLRA and the SSA, and those Acts were subsequently amended to indicate that the common-law test for employee status should be used to determine the difference between employees and independent contractors.[99] The economic realities test, however, has remained because Congress did not amend the FLSA, arguably meaning that Congress approved of the Court's rejection of common law standards for determining employee status under this legislation.[100]

As it was originally created, the economic realities test was a very generous one. The Court recognized that Congress had not used "employee" as a term of art, but rather that the term "takes color from its surroundings . . . [in] the statute where it appears."[101] Further, the term should be "read in the light of the mischief to be corrected and the end to be attained."[102] Accordingly, in fashioning their test, the Court took into consideration the circumstances of those workers who "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate [and who would be afforded relief by the Act]."[103] The test boiled down to "when the [employment situation] combines these characteristics, so that the economic facts of the relation make it more nearly one

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92. *See Devine*, 100 F.3d at 81; *Strother*, 79 F.3d at 867.

93. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 702 (7th Cir. 2002); Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 148 (S.D.N.Y. 1987).

94. *Strother*, 79 F.3d at 867.

95. *See Caruso*, 664 F. Supp. at 148.

96. NLRB v. Hearst, 322 U.S. 111, 127-28 (1944), *overruled in part by* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992).

97. United States v. Silk, 331 U.S. 704, 713-14 (1947).

98. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947).

99. Dowd, *supra* note 39.

100. *Id.* at 93.

101. *Hearst*, 322 U.S. at 124 (quoting United States v. Am. Trucking Ass'ns, 310 U.S. 534, 545 (1940)).

102. *Id.* (quoting S. Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

103. *Id.* at 127.

of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification . . . ."[104]

In *NLRB v. Hearst Publications*,[105] the Court found that the purpose of the NLRA was to avoid labor disputes by providing a remedy to the inequality in bargaining power over wages, hours, and working conditions.[106] Those persons who, as a matter of economic reality, suffered from the situation the Act was intended to alleviate and could be provided relief by the Act were considered employees under the Act, regardless of their common-law employee status.[107]

Had this test remained unadulterated over the years, the issue discussed in this Note would not exist. Using the above approach, the shareholder in our opening hypothetical would clearly be a person who suffered from the situation the ADEA intended to alleviate[108] and who could be provided relief by the Act. The economic realities test, however, has undergone some very restrictive changes since the 1940's.[109]

Perhaps the most frequently cited case as standing for the economic realities test used to determine the status of a partner or shareholder is *EEOC v. Dowd & Dowd, Ltd.*[110] In *Dowd*, the EEOC brought suit against a professional corporation, alleging a violation of Title VII for failure to provide pregnancy benefits to its female employees under the Pregnancy Discrimination Act.[111]

The principle question before the court was whether shareholders of the PC should be counted as employees for purposes of the statutory minimum number of employees under Title VII.[112] Resting on its decision in *Burke v. Friedman*,[113] that partners could not be considered employees under the Act, the court determined that "[t]he economic reality of the professional corporation in Illinois is that the management, control, and ownership of the corporation is much like the management, control, and ownership of a partnership."[114] Without any

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104. *Id.* at 128.

105. 322 U.S. at 111.

106. *See* United States v. Silk, 331 U.S. 704, 713 (1947) (explaining the Court's decision in *Hearst*).

107. *Id.*

108. Mandatory retirement is illegal per se under the ADEA. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1540 (2d Cir. 1996) ("any policy that requires such employees to retire, solely on account of age, before they reach 65, violates the ADEA.").

109. However, at least one court has used the economic realities test as it was originally intended. *See* Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983) (applying the economic realities test to determine that a parent corporation and subsidiary corporation should be given single employer status for purposes of determining the number of employees in the corporation under Title VII).

110. 736 F.2d 1177 (7th Cir. 1984).

111. *Id.* at 1177.

112. *Id.* at 1178.

113. 556 F.2d 867 (7th Cir. 1977). *See also supra* notes 89-95 and accompanying text.

114. *Dowd*, 736 F.2d at 1178.

analysis of the shareholders' individual situations, the court held that they were analogous to partners and not to be considered employees under Title VII.[115] Even though the economic realities test requires a detailed analysis into each individual's situation, the Seventh Circuit's ruling in *Dowd* has almost become a per se rule that shareholders are not employees.[116]

In cases which are more fully reasoned, several factors to be evaluated under the modern economic realities test begin to emerge.[117] These factors include how the individual is compensated,[118] whether the individual has management authority and to what extent that authority may be exercised,[119] and the amount of control the purported employer exercises over the individual's work.[120]

Applying the modern economic realities test to the shareholder in this Note's opening hypothetical would almost certainly result in the dismissal of his claim. Looking first at compensation, the shareholder takes a regular salary, but also receives bonuses in the form of profit-sharing. The bonus compensation would probably result in his classification as a partner.[121]

The next step in the analysis, an examination of the shareholder's management authority, does not militate in his favor either. As the test has been used, it does not matter that the shareholder is not involved in the day-to-day

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115. *Id.*

116. *See* Schmidt v. Ottawa Med. Ctr., P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001) ("Under Seventh Circuit law, the economic reality in this case is that, in his capacity as a shareholder, Dr. Schmidt is like a partner in a partnership."); Smith v. Deitsch & Royer MD, Inc., 2000 W.L. 1707964, at *2 (S.D. Ind. 2000) ("The Seventh Circuit's decision in *Dowd & Dowd* is clear and cannot be distinguished on any meaningful basis [therefore Doctors Deitsch and Royer cannot be counted as employees]."). It is also worth noting, however, that the Seventh Circuit may be easing its stance against shareholders. In *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), the court's ruling centered around whether Sidley must comply with the EEOC's subpoena, but in its lengthy opinion the court also stated that "there is authority that employee shareholders of a professional corporation are still employees, not employers, for purposes of federal antidiscrimination law." *Id.* at 703. Much of the opinion is dicta, and the court does specifically state that it is not ruling at this time that Sidley's partners were employees, but it does indicate that the Seventh Circuit is at least open to the idea. *Id.* at 707.

117. My classification, the "modern economic realities test," is not used by any court, but is simply a method in this Note to distinguish the way that courts currently utilize the economic realities test from the way the Supreme Court originally intended it.

118. *Schmidt*, 155 F. Supp. 2d at 922.

119. Fountain v. Metcalf, Zima & Co., 925 F.2d 1398, 1401 (11th Cir. 1991).

120. *Schmidt*, 155 F. Supp. 2d at 922.

121. In *Schmidt*, the court determined that a doctor, who had declined the opportunity to participate in a profit sharing plan, choosing to receive a straight salary instead, was not an employee because he had the right to share in the profits of the firm. *Id.* It is not clear, but our shareholder may have found the *Fountain* court more forgiving. In *Fountain*, an accountant was found to be excluded from protection under the ADEA, in part, because his compensation was based entirely on the firm's profits and losses. 925 F.2d at 1401. In contrast, our partner only receives bonuses based on the firm's profits.

decisions of the firm; rather it is enough to exclude him from coverage if he simply has some input in the management of the firm, regardless of the actual level of that input.[122]

The last step of analysis would put the final nail in his coffin. Given his position and experience in the firm, the shareholder has complete discretion over his own work. He is still subject to his fellow shareholders for incompetence or failure to complete his work, but there is really no oversight of his daily activities. Using this test, as it has been applied by the courts which employ it, our shareholder would have no claim for age discrimination, even though the only reason for his termination was age.

### *C. The Common Law Agency Test*

The traditional economic realities test was originally created by the Supreme Court to differentiate between employees and independent contractors.[123] This approach was expressly repudiated by the Court in *Nationwide Mutual Insurance Co. v. Darden*, adopting the common law agency test instead.[124] Because the Court's holding in *Darden* was limited to the proper test for distinguishing independent contractors from employees, it has not been used by many courts to determine the employee status of partners, shareholders, or members.[125] Nevertheless, the common law agency test is worth a brief discussion here because of its inclusion in the hybrid test, discussed below.[126]

In *Darden*, an insurance agent sued for retirement benefits allegedly due him under ERISA.[127] Relying on the Court's ruling in *Hearst*, the lower court determined that the insurance agent was an employee under the Act.[128] The Supreme Court reversed, ruling that the common law agency test should be used to determine employee status.[129]

The Court stated that the elements to be considered in the common law agency test are:

> the hiring party's right to control the manner and means by which the

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122. In *Schmidt*, another reason the doctor was excluded from coverage was because of his management authority. Even though he was not a member of the medical center's Board of Directors, which exercised primary control of the firm, he did still have a vote in all shareholder meetings and had sat on the Board at previous times in his career. 155 F. Supp. 2d at 922. "[T]he fact that one or more shareholders or partners might have more influence than others does not support a finding that the others are employees." *Id.*

123. *See supra* notes 96-122 and accompanying text.

124. 503 U.S. 318, 323 (1992).

125. *See* Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 n.4 (8th Cir. 1996); Wheeler v. Hurdman, 825 F.2d 257, 271-72 (10th Cir. 1987).

126. *See infra* notes 132-36 and accompanying text.

127. *Darden*, 503 U.S. at 320.

128. *Id.* at 324.

129. *Id.* at 323.

> product is accomplished . . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[130]

Because this test is not appropriate for determining the employee status of a partner, shareholder, or member, it is not necessary to apply it to our hypothetical shareholder. There is no question that the shareholder is an agent of the business; the question is whether he is an employee or really an owner.[131]

### *D. The Hybrid Test*

The hybrid test is essentially a combination of the modern economic realities test and the common law agency test. It has been used primarily by courts where the hybrid test had been used previously to distinguish employees and independent contractors, and then, when faced with an issue of first impression, the court applied it to the partner, shareholder, or member issue.[132]

No one factor of the hybrid test is determinative, but the right to control an employee's work is the most important.[133] The other elements comprising the hybrid test are:

> (1) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the employer or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the employer; (9) whether the worker accumulates retirement benefits; (10) whether the employer pays

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130. *Id.* at 323-24 (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).

131. *See* Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 n.4 (8th Cir. 1996) ("The shareholder-directors are clearly part of [the firm]. The question is whether they manage and own the firm.").

132. *See, e.g.*, Goudeau v. Dental Health Servs., Inc., 901 F. Supp. 1139, 1143 (M.D. La. 1995); Jones v. Baskin, Flaherty, Elliot & Mannino, P.C., 670 F. Supp. 597, 601 (W.D. Pa. 1987).

133. *Goudeau*, 901 F. Supp at 1142.

social security taxes; and (11) the intention of the parties.[134]

As with the common law agency test, the problem with the hybrid test is that it was designed for the independent contractor question. The questions posed by the test are entirely inappropriate to the issue of whether an individual is an employee or an employer.[135] "The line-drawing exercise in [cases distinguishing independent contractors is] between those who [are] really part of a business (employees) and those who [are] running a separate business (independent contractors). Factors employed for that purpose are useless for drawing lines between people who are part of the same enterprise."[136]

### *E. The* Serapion *Test and Other Partnership Law Tests*

In *Serapion v. Martinez*,[137] a female partner in a law partnership was elevated from the position of "junior" partner to that of a "senior" partner.[138] Along with this elevated position, she was allegedly due an equal footing, in terms of compensation and management control, with the other (all male) senior partners.[139] These benefits were not forthcoming and when Serapion demanded the benefits due to her, the other senior partners dissolved the firm and formed a new partnership without her.[140] Serapion subsequently brought suit against the firm under Title VII.[141]

In order to determine if Serapion, a senior partner in a partnership, was an "employee" under Title VII, the court fashioned a test which examined "three broad, overlapping categories: ownership, remuneration, and management."[142] The first category looked for proprietary indicators such as "investment in the firm, ownership of firm assets, and liability for firm debts and obligations."[143] The second category examined primarily whether and to what extent "the individual's compensation is based on the firm's profits."[144] The third category examined the individual's "right to engage in policymaking; participation in, and voting power with regard to, firm governance; the ability to assign work and to direct the activities of employees within the firm; and the ability to act for the firm and its principals."[145] Applying this test, the court found that Serapion was not an employee under Title VII.[146]

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134. *Id.*
135. Wheeler v. Hurdman, 825 F.2d 257, 271-72 (10th Cir. 1987).
136. *Id.*
137. 119 F.3d 982 (1st Cir. 1997).
138. *Id.* at 984.
139. *Id.*
140. *Id.* at 985.
141. *Id.* at 986.
142. *Id.* at 990.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 992.

Under the first and second prongs of analysis, ownership and remuneration, the court found undisputed facts that Serapion's compensation was substantially tied to the firm's profits.[147] Further, the court found that Serapion was liable for firm debts on a pro rata share and that she had made substantial capital contributions to the firm.[148]

Under the third prong of analysis, management, the court found that Serapion was allowed a vote on all matters before the Board of Partners (the highest decision-making body in the firm)[149] and was also one of five voting members on the firm's Executive Committee, which handled day-to-day operations for the firm.[150] In effect, Serapion was able to participate at all levels of firm management.

Other courts have established similar tests to evaluate partnership status. One variation is to examine traditional partnership law factors, such as whether the individual made a capital contribution to the firm,[151] whether the individual shared in profits and was liable for losses,[152] whether the individual had a right to examine the firm's books and records,[153] the existence of a fiduciary relationship between the purported partners,[154] and the degree of the individual's management authority.[155] Another variation looked at the method of compensation, responsibility for liabilities of the firm, the firm's management structure, and the individual's role in that management.[156] Yet another test examined whether the individual managed and owned the business.[157]

In his Note, David R. Stras[158] proposed that the *Serapion* test should be adopted by the courts in order to deal with the issue of whether a partner or

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147. *Id.* at 991.

148. *Id.*

149. Junior partners were only allowed votes on matters that affected their own interests. *Id.*

150. *Id.*

151. Simpson v. Ernst & Young, 850 F. Supp. 648, 659 (S.D. Ohio 1994). In *Simpson*, based on the following analysis (see *infra* notes 152-55), the court determined that an accountant employed by a partnership and alleged to be a partner was an employee for purposes of the ADEA. The court found that the accountant's contribution to the partnership's Capital Account was more like a loan than a true capital contribution. *Id.* at 659-60.

152. *Id.* at 660. The court found that the accountant was not liable for firm losses, he received a straight salary, and his bonuses were not tied to firm profits. *Id.*

153. *Id.* at 661-62. Noting that, under New York law, a basic tenet of a bona fide partnership is that all partners have access to the firm's financial records, the court found that the accountant had no unconditional right to examine the firm's records. *Id.*

154. *Id.* at 662. The court found that because the accountant had no right to examine the firm's records, there was no fiduciary relationship between the accountant and the Management Committee. *Id.*

155. *Id.* Finally, the court found that the accountant had no management authority. *Id.*

156. Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867 (9th Cir. 1996).

157. Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996) (examining the status of a shareholder/director in a PC).

158. *See* Stras, *supra* note 60.

shareholder is an employee.[159] The test does, however, have several drawbacks.

The first problem is that because the elements of the *Serapion* test rely so heavily on partnership indicia, when they are applied to a shareholder in a PC, the results may be skewed.[160] The most problematic element is the examination of whether the shareholder was responsible for debts of the firm.[161] In a true corporation, of course, the shareholder would not be liable.

The second and perhaps more damaging problem is that the test has no standards for application.[162] In *Serapion* itself, the partner had such clear ownership indicia that it is doubtful she could have been considered an employee under any test. It is not the straightforward cases which tend to give direction, but the ones in the gray area, requiring extensive analysis, that truly indicate how a test is to be applied. In the absence of a good example on how to use the test, the outcome of a case where the *Serapion* test was applied could easily depend on the generosity of the judges.

The ambiguity of this test is illustrated in its application to the facts of our hypothetical shareholder. Under the first prong of analysis, ownership, his only ownership interest in the firm would be the shares that he holds. Under the second prong of analysis, remuneration, things may look a little worse. Our shareholder takes a regular salary, but his profit sharing is based on actual firm revenue; nevertheless, his remuneration is certainly less tied to the firm's profits than that of the attorney in *Serapion*. Under the final prong of analysis, management, our shareholder is involved in management and does have authority to assign work and direct employees of the firm, but both to a lesser extent than the attorney in *Serapion*. So what happens to our hypothetical shareholder? There is no real way to know. He certainly has fewer partnership indicia than the attorney in *Serapion*, but there are still some identifiable factors militating against him. In all likelihood, the success or failure of our shareholder's claim would depend on the judge's own views on the subject, rather than on any predictable point of law.

Adopting a test without defining standards would leave employers and employees in the dark. On at least one occasion the Supreme Court has discarded a test for just such a reason.[163] Any proposed test to be adopted by the courts must have clear enough standards so that employers will understand the consequences of their conduct and employees will fully understand their status. The trick, of course, is fashioning a test which meets the above criteria, while still allowing the court to examine the facts on a case-by-case basis.

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159. *Id.* at 271.

160. Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 984 (10th Cir. 2002) (declining to adopt the *Serapion* test to determine shareholder status).

161. *Id.*

162. As of the date of the writing of this Note (Feb. 6, 2003), I was unable to find a court which had picked up and applied the *Serapion* test for determining shareholder or partner status.

163. *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992) (rejecting the lower court's approach because the test was unable to furnish predictable results).

*F. The Second Circuit's Corporate Form Standard and Partnership Test*

The corporate form standard, as it was originally created, certainly met the first criteria for a successful test. However, until the test was expanded later, it failed to allow the courts to examine the facts on a case-by-case basis.

The corporate form standard originated in *Hyland v. New Haven Radiology Associates, P.C.*[164] In *Hyland*, a radiologist, who was also a shareholder/director of the PC, alleged that he had been forced to retire because of his age and consequently filed suit under the ADEA.[165] The lower court dismissed his claim on the grounds that he was essentially a partner and therefore was not entitled to the benefits of the ADEA.[166] On appeal, however, the court reversed, finding that there was no basis to consider the firm a partnership and that the radiologist was a corporate employee.[167]

The court's reasoning was fairly simple; since the radiologists freely chose to form a corporation in order to take advantage of certain tax and employee benefits, they should not then be able to later say that they are really a partnership in order to avoid the anti-discrimination laws.[168] The court further stated that "[w]hile those who own shares in a corporation may or may not be employees, they cannot under any circumstances be partners in the same enterprise because the roles are mutually exclusive."[169]

Outside the Second Circuit, the corporate form standard has been much maligned. With the exception of the Western District Court of Pennsylvania and the Ninth Circuit,[170] most other courts to consider the standard have declined to

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164. 794 F.2d 793 (2d Cir. 1986).

165. *Id.* at 794.

166. *Id.*

167. *Id.*

168. *Id.* at 798.

169. *Id.*

170. *See* Gorman v. N. Pittsburgh Oral Surgery Assocs., Ltd., 664 F. Supp. 212 (W.D. Pa. 1987) (adopting the *Hyland* corporate form standard to determine the status of a shareholder under the ADEA); *see also* Wells v. Clackamas Gastroenterology Assocs., P.C., 271 F.3d 903 (9th Cir. 2001) (applying the *Hyland* corporate form standard to determine that the firm's shareholders should be counted as employees under the American's with Disabilities Act of 1990), *cert. granted*, 536 U.S. 990 (2002). Since certiorari has been granted in *Wells*, but the Court has not yet issued its opinion, it is difficult to know the future of the corporate form standard. It is worth noting, however, that the Ninth Circuit's decision in *Wells* was based entirely on the corporate form standard; the court did not undertake the additional analysis adopted by the Second Circuit in *Johnson*. *See infra* notes 173-87 and accompanying text. If the Court does reverse the Ninth Circuit and discard the corporate form standard, it should not have a major effect on the way the Second Circuit currently handles these cases. *Author's Note—This prediction proved to be less than accurate. The Court's reversal of the Ninth Circuit had wide ranging effects for the entire issue. See the Addendum for a discussion of the Court's decision in* Clackamas Gastroenterology Associates, P.C. v. Wells, *123 S. Ct. 1673 (2003).*

use it, typically classifying it as an "exaltation of form over substance."[171]

Such disagreement was probably justified.[172] While the Second Circuit certainly deserves credit for honoring the remedial purposes of Title VII and the ADEA, its total failure to consider anything beyond the form of the business entity in question was remiss. The Second Circuit clarified the issue, however, with its decision in *EEOC v. Johnson & Higgins, Inc.*[173]

In *Johnson*, a shareholder/director alleged that the firm's mandatory retirement policy was in violation of the ADEA.[174] Citing *Hyland*, the court easily dispensed with the firm's first argument that the protections of the ADEA should not apply to the shareholder because he is really a partner.[175] This was not, however, the end of the court's analysis. The firm also argued that even if the shareholder/director is not excluded as a partner, he should be excluded because, in his capacity as a director, he was more like an employer than an employee.[176] The court allowed that this was a legitimate argument and went on to discuss its analysis.[177]

The court began by citing a number of cases[178] which had held that "although corporate directors are traditionally viewed as employers, they may also be considered employees depending on their position and responsibilities within the corporation."[179] To analyze whether the director was also an employee, the court fashioned a test relying heavily on the common law agency test.[180] The factors employed by the court were: "(1) whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy."[181] Applying the test, the court found that the directors were employees under the Act because they performed traditional employee duties on a full-time basis and, even though the directors were members of the board, they still had to report to and were under the authority of the senior members of the

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171. Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400 (11th Cir. 1991); *see also* Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996).

172. It should be noted that while the Second Circuit's decision in *Hyland* did not necessarily stand for the proposition that all shareholders are employees, the court was not clear in its holding on that matter until years later. *See infra* notes 173-87 and accompanying text.

173. 91 F.3d 1529 (2d Cir. 1996).

174. *Id.* at 1531.

175. *Id.* at 1537-38.

176. *Id.* at 1538.

177. *Id.*

178. *Id.* at 1538-39 (citing Chavero v. Local 241, 787 F.2d 1154, 1157 (7th Cir. 1986); Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983); EEOC v. First Cath. Slovak Ladies Ass'n, 694 F.2d 1068, 1070 (6th Cir. 1982)).

179. *Id.* at 1539.

180. *Id.*

181. *Id.*

board.[182]

As the test has been applied to later cases, certain standards of evaluation have begun to emerge. In *Kern v. City of Rochester*,[183] the deciding factor in finding that the board members were not employees was the fact that they did not perform traditional employee duties.[184] In *Drescher v. Shatkin*,[185] the primary point of analysis was the level of management authority held by the director.[186] Determining that the *Johnson* court had intended for this to be a very high level since the directors were actually board members, but still employees under the Act, the court established that unless the director had the power or ability to change what he or she complained of, then that individual must be an employee.[187]

Applying these standards to our shareholder in the opening hypothetical, he will clearly be allowed to proceed with his claim. As an active attorney, the shareholder is performing traditional employee duties, as would almost any other professional active in a PC. Under the analysis of his management responsibilities, the facts fit neatly into the rule explained by the *Drescher* court. Our shareholder is involved in some management of the firm, but is not a member of the management committee, which made the decision to institute the mandatory retirement policy. He does not have the power or ability to change what he complains of.

Even though I am in favor of a broad interpretation of "employee" under the Acts, the Second Circuit has probably gone too far in honoring the remedial purposes of the Acts. The first concern is with the corporate form standard itself. It has been widely accepted by the courts that the protections of Title VII and the ADEA, among others, apply only to employees, not owners of businesses.[188] Adopting the premise that partners are owners, the per se exclusion for partners was an attempt by the courts to enforce the idea that owners should not receive protection under the Acts.[189] The corporate form standard was probably adopted in the interests of equity and in response to the per se exclusion for partners. While it is logically appealing to say that a business cannot claim the benefits of incorporation and then call itself a partnership to avoid anti-discrimination laws, such an analysis does not fully honor the purpose of the Acts.[190] The

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182. *Id.* at 1539-40.

183. 93 F.3d 38 (2d Cir. 1996).

184. *Id.* at 47.

185. 280 F.3d 201 (2d Cir. 2002).

186. *Id.* at 204.

187. *Id.* (finding that the sole shareholder in a PC could not be considered an employee under Title VII, for purposes of reaching the statutory minimum number of employees, because he held all of the management authority).

188. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 797 (2d Cir. 1986); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (7th Cir. 1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977).

189. *See Burke*, 556 F.2d at 869.

190. The analysis also fails to give any direction whatsoever on how the courts should handle

determination of employee or owner must include a detailed analysis of the specific facts, and should not rely on any per se rule.[191]

The second problem with the Second Circuit's approach is in the factors adopted under *Johnson*. The first two elements (examining the director's activities and whether he or she was employed by a separate entity)[192] are essentially common law agency elements.[193] As has been previously discussed, the elements of the common-law agency test do not differentiate between employees and owners, but instead between employees and independent contractors.[194] It is almost a given that a professional in a PC will be performing traditional employee duties, and it is highly unlikely that an inquiry into whether a professional is employed by any other entity would indicate whether he or she was an owner or employee.

The third element, examining management responsibility,[195] is an appropriate element of analysis and should be included in any test adopted, but the Second Circuit has been too liberal in applying it. Under the Second Circuit's rule, the only shareholder who would be excluded from protection under the Acts would be a firm's sole decision-maker, because he or she would be the only person who could unilaterally control a situation.[196] Even if the power of control were equally spread between four shareholders, they would each be considered employees because any one of them could not control the situation alone.[197] Such an analysis provides no guidance whatsoever regarding whether a shareholder is an owner or an employee.

The Second Circuit applies a better test when evaluating the status of partners.[198] In *Caruso v. Peat, Marwick, Mitchell & Co.*,[199] the court considered the question of whether an accountant partner was an employee under the ADEA.[200] To analyze the facts, the court developed a test containing three factors: "(1) The extent of the individual's ability to control and operate his business; (2) The extent to which an individual's compensation is calculated as

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an LLC.

191. *See* Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 867 (9th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400 (11th Cir. 1991).

192. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d. Cir. 1996); *see also supra* note 181 and accompanying text.

193. *See supra* notes 123-31 and accompanying text.

194. *See* Serapion v. Martinez, 119 F.3d 982, 986 (1st Cir. 1997); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 n.4 (8th Cir. 1996); Wheeler v. Hurdman, 825 F.2d 257, 271-72 (10th Cir. 1987).

195. *Johnson*, 91 F.3d at 1539; *see also supra* note 181 and accompanying text.

196. Drescher v. Shatkin, 280 F.3d 201, 204 (2d. Cir. 2002).

197. *See generally id.*

198. This discussion may have been more appropriate in the section discussing tests for partnership status (*see supra* notes 137-63 and accompanying text), but because it does not necessarily contain the same drawbacks as other partnership tests, I have included it here.

199. 664 F. Supp. 144 (S.D.N.Y. 1987).

200. *Id.* at 145.

a percentage of business profits; and (3) The extent of the individual's employment security."[201]

Reasons for the first two elements of the test should be obvious, but a brief note is in order regarding the third. The court developed the third element with the traditional understanding that, under New York law, a partner "works as a permanent employee of his firm."[202] "The typical firm may not fire a partner or otherwise terminate his employment merely because of disappointment with the quantity or quality of his work, but may only remove the partner in extraordinary circumstances."[203] Therefore, if a partner is employed at-will,[204] then he is probably not a true partner.

In *Caruso*, the accountant was allowed to proceed with his claim under the ADEA.[205] The court determined that because the accountant had virtually no control over his own work, his salary was only nominally tied to firm profits, and he was employed at-will, he was not a true partner.[206]

The standard of analysis regarding the ability to control and operate the business was further clarified in *Ehrlich v. Howe*.[207] In *Ehrlich*, the court examined a purported partner's ability to control the firm and found that he had substantially more power than the accountant in *Caruso*.[208] Evidence showed that he was involved in all of the firm's decision-making meetings and that 80% of the partnership vote was required in order to adopt all firm decisions.[209] Given the 80% voting requirement, the court found that the partner could have vetoed any firm decision with the support of only one other partner.[210] While the court here does not explicitly say so, it seems to be applying a standard of meaningful participation in management. The standard appears to be less than the *Drescher* standard of total control over one's situation,[211] but considerably more generous than the *Schmidt* standard of *any* control.[212]

## IV. A PROPOSED SOLUTION FOR DEFINING "EMPLOYEE" UNDER THE ADEA

At this point, it may be appropriate to discuss the importance of having a unified approach to defining "employee" under the ADEA and the other anti-discrimination statutes. For lawyers, at least, mega-firms with offices in several

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201. *Id.* at 149-50.

202. *Id.* at 149.

203. *Id.*

204. In other words, the employment relationship is terminable at the will of either party for any reason.

205. *Caruso*, 664 F. Supp. at 150.

206. *Id.*

207. 848 F. Supp. 482 (S.D.N.Y. 1994).

208. *Id.* at 487-88.

209. *Id.* at 487.

210. *Id.*

211. *See supra* notes 185-87 and accompanying text.

212. *See supra* note 122 and accompanying text.

locations are becoming more and more common. If a firm had offices in Chicago (Seventh Circuit), New York (Second Circuit), and Boston (First Circuit), it could potentially face varying degrees of liability in each jurisdiction for the exact same conduct. Depending, of course, on the type of business organization and the activities in question, the firm would probably not face liability for its activities in the Chicago office; probably would face liability for its activities in the New York office; and may or may not face liability for its activities in the Boston office (depending on the mood of the judge).[213]

In an increasingly connected business environment, where it is commonplace for organizations to have several locations across the country, it is vital that a firm be able to determine its liabilities with some degree of certainty. Having consistently identifiable standards for who qualifies as an employee under the anti-discrimination statutes would allow firms to make appropriate choices and avoid expensive litigation. Further, employees would also have a clear understanding of their rights under the Acts, thereby presumably avoiding litigation which has no basis in the law.

### *A. The Appropriate Inquiry and Rejection of Inappropriate Tests*

In fashioning an appropriate test, the first consideration must be to honor congressional intent.[214] As previously discussed, Congress arguably wanted the protections of the Acts to be applied broadly.[215] Such an intention should color every step of the test. While coverage under the Acts should not be expanded beyond that which Congress intended,[216] neither should the Acts be read in a restrictive manner so as to exclude those who should be covered (i.e. older workers under the ADEA).[217]

It is clear that Congress did not intend the Acts to protect owners of businesses.[218] Accordingly, the proper test will be one which differentiates

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213. *See supra* notes 162-63 and accompanying text (discussing the lack of identifiable standards under the First Circuit's *Serapion* test).

214. Negonsott v. Samuels, 507 U.S. 99, 104 (1993) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)) ("Our task is to give effect to the will of Congress . . . ."); Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

215. *See supra* notes 39-50 and accompanying text.

216. *See* Wheeler v. Hurdman, 825 F.2d 257, 275 (10th Cir. 1987) ("There are statutory limitations to the argument that the remedial ends of the Acts justify as means any definition of employee which results in coverage.").

217. *See* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986) ("The statute is considered remedial in nature and must be given a liberal interpretation in order to effectuate its purposes.").

218. *See* Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997); Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996); *Hyland*, 794 F.2d at 796.

between owners and employees.[219] Of course, some of the tests used by the Circuits are better than others in identifying the differences between owners and employees.

There are a few tests which may be eliminated immediately. The first are the per se tests—both the per se exclusion for partners,[220] and the corporate form standard.[221] Most courts are in agreement that whether an individual is covered by the Acts must be determined by a factual inquiry.[222] Reliance on a rigid per se rule may be easy to apply, but it ignores the congressional intent behind the legislation.[223]

Next to be eliminated are the hybrid tests[224] and other tests which derive their factors from the common law agency test. As previously discussed, the common law agency factors do not really illuminate the issue of whether an individual is an owner or an employee.[225] Rather, the factors determine whether the individual is an agent of the enterprise.[226] This is not the inquiry we are interested in. Accordingly, the hybrid test, which derives most of its factors from the common law agency test, should be discarded.

The other test to be discarded here is the test developed by the Second Circuit in *Johnson*.[227] There are several problems with the *Johnson* test, but the concern here is with the first two elements of the test:[228] "(1) whether the director has undertaken traditional employee duties; [and] (2) whether the director was regularly employed by a separate entity . . . ."[229] Both of these elements are essentially inquiries into the agency status of an individual. The first factor will almost always be met in the context of a partnership, PC, or LLC, and the second factor is better suited to determining if someone is an independent contractor, not an owner of a business.

After abandoning these tests, we are left with the modern economic realities test (as applied by the Seventh Circuit),[230] the partnership tests (including the

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219. *See Serapion*, 119 F.3d at 987; *Hyland*, 794 F.2d at 797.

220. *See supra* notes 89-95 and accompanying text.

221. *See supra* notes 164-71 and accompanying text.

222. *Serapion*, 119 F.3d at 987; Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1991).

223. *Devine*, 100 F.3d at 80-81.

224. *See supra* notes 132-36 and accompanying text.

225. *See Devine*, 100 F.3d at 81 n.4; Wheeler v. Hurdman, 825 F.2d 257, 271 (10th Cir. 1987); *see also supra* notes 123-31 and accompanying text.

226. *Devine*, 100 F.3d at 81 n.4.

227. *See supra* notes 174-94 and accompanying text.

228. The third element will be discussed below. An analysis of management authority is proper, but the Second Circuit is far too generous in its application. *See infra* notes 235-37 and accompanying text.

229. EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir. 1996).

230. *See supra* notes 110-22 and accompanying text.

First Circuit's *Serapion* test),[231] the remaining element of the *Johnson* test, and the Second Circuit's partnership test.[232] While these tests are better reasoned than those discussed above, they are not without flaws.

With regard to the modern economic realities test, the third factor is particularly troublesome (examining the amount of control the purported employer exercises over the individual's work).[233] Operating under the general assumption that workers are able to exercise more control over their work as they get older and gain more experience, application of this factor to those who would make a claim under the ADEA would work to exclude the very people the ADEA was meant to protect.

Beyond the common-sense argument, however, this factor looks like it has been lifted directly from the common law agency test. Keep in mind that the proper analysis is whether someone is an owner or an employee. High ranking employees of large corporations are frequently able to exercise great control over their own work, but no one would argue that such an employee was the owner of the business. It could be argued that this element is simply an inquiry into management authority, but because the second element of the modern economic realities test does expressly examine management authority, this third element would be redundant.

Analyzing the *Serapion* test and other partnership tests outside the Second Circuit, the factors which examine ownership status are not necessarily appropriate for broad application outside of partnerships. For example, while an individual must be liable for the firm debts in order to be a partner (and presumably an owner),[234] a shareholder or member may not be liable for firm debts, but could still be an owner of the business. This factor should not be discarded entirely, but, given its limited applicability, it should not be a decisive factor.

The third element of the Second Circuit's *Johnson* test should also be dropped, thereby totally eliminating the test. The third element of the test examines management authority,[235] but the standard which has developed is too generous. As applied by the Second Circuit, any individual who did not have complete control over his or her situation would be considered an employee.[236] Most courts are in agreement that an individual need not exercise complete control in order to be considered an owner.[237] Applying the Second Circuit's standard could create ridiculous results. For example, in a three partner firm, with all decisions requiring only a simple majority (two votes), the partners would be considered employees instead of owners because the odd partner out

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231. *See supra* notes 137-63 and accompanying text.

232. *See supra* notes 198-212 and accompanying text.

233. Schmidt v. Ottawa Med. Ctr., P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001).

234. *See* 3 CAVITCH, *supra* note 48, § 13.05.

235. *See* EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1539 (2d Cir. 1996).

236. Drescher v. Shatkin, 280 F.3d 201, 204 (2d. Cir. 2002).

237. Serapion v. Martinez, 119 F.3d 982, 992 (1st Cir. 1997); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1401 (11th Cir. 1991).

in any vote would be unable to control his or her own situation with a single vote.

Finally, turning to the Second Circuit's partnership test, the third element, which examines job security and was based on principles of New York state law,[238] should be eliminated. Any test adopted should be applicable to all jurisdictions. Further, whether an individual qualifies as an "employee" under the Acts should be determined according to principles of federal law.[239]

### *B. The Appropriate Test and Standards for Evaluation*

After abandoning the tests and elements discussed above, we are basically left with various test elements which examine remuneration and management authority. The following analysis will identify how these ownership indicia should be examined and what standards should be applied.

Again, in fashioning the test and its standards, the primary consideration should be to honor the intention of Congress in passing the ADEA.[240] In this respect, there appear to be two limiting factors. The first is that this is remedial legislation, which should be interpreted broadly to protect older workers.[241] The second is that Congress did not intend the Act to protect owners.[242] The standards of the test, therefore, must fall between these two extremes.

Turning first to the Seventh Circuit's examination of remuneration, it appears to be in violation of the goal that the Act be interpreted broadly. In *Schmidt*, the court found that a doctor in a PC, who received a straight salary, choosing not to participate in the firm's profit sharing plan, was not an employee under the ADEA because he had the right to participate in a profit sharing plan.[243] In numerous forms, profit sharing has become a common way of rewarding workers of all levels of responsibility.[244] To exclude all individuals who may be entitled to the benefits of profit sharing, regardless of the level of their actual participation in such a plan, could effectively render the Act moot.

A better test is the one employed by the Second Circuit in partnership cases, which examines the "extent to which an individual's compensation is calculated as a percentage of business profits. . . ."[245] Such a test actually examines the

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238. *See supra* notes 201-04 and accompanying text.

239. *See Serapion*, 119 F.3d at 988.

240. *See* Negonsott v. Samuels, 507 U.S. 99, 105 (1993) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982)); Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979)).

241. *See* Hyland v. New Haven Radiology Assocs., P.C., 794 F.2d 793, 796 (2d Cir. 1986).

242. *See Serapion*, 119 F.3d at 985; Kern v. City of Rochester, 93 F.3d 38, 45 (2d Cir. 1996); *Hyland*, 794 F.2d at 796.

243. Schmidt v. Ottawa Med. Ctr., P.C., 155 F. Supp. 2d 919, 922 (N.D. Ill. 2001).

244. *See* EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 703 (7th Cir. 2002) ("[M]any corporations base their employees' compensation in part anyway, but sometimes in very large part, on the corporation's profits, without anyone supposing them employers.").

245. Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 149 (S.D.N.Y. 1987). For ease of writing, from this point on, this concept will be referred to as "profit sharing."

level of ownership an individual enjoys rather than relying on a bright-line test which excludes all who may be entitled to profit sharing.

The percentage of total remuneration made up by profit sharing allowed to an individual who may still be considered an employee is more difficult to determine. Such a standard would need to develop in the courts over time; however, common sense is a good guide. Certainly, any individual whose remuneration is 100% profit sharing would have to be considered an owner rather than an employee. Perhaps even those with 50% of their remuneration made up by profit sharing should be excluded. On the other side, those with minimal profit sharing, perhaps less than 20% or 30% of their total remuneration, would be protected as employees under the Act. More than that amount (and less than 50%), however, becomes less clear. A court faced with such a decision would probably need to make the management analysis more determinative.

An inquiry into whether the individual is liable for losses of the firm should also be included in the analysis of remuneration.[246] Because this factor may not be present in every business form, it should not be determinative; however, where liability for the firm's losses is present, it would strongly indicate ownership status.

Turning now to the management prong of the test, the Seventh Circuit's analysis again appears to be in violation of the proper approach when dealing with remedial legislation. In *Schmidt*, the court also cited the doctor's management authority as a reason for his exclusion from the Act's protection.[247] The doctor's participation in shareholder meetings was enough to exclude him, even though he had no participation on the firm's Board of Directors, which exercised primary control of the firm.[248] While it would be ridiculous to require that an individual be able to exercise complete control over his or her situation before finding ownership status, it is equally ridiculous to find that anyone who exercises *any* control is an owner. While the Seventh Circuit's standard here is not as restrictive as its standard for remuneration, it still fails to broadly interpret the Act in order to give effect to the remedial goals of the legislation.

A far better standard would be one which looks for meaningful participation in management, similar to that employed by the Second Circuit in partnership cases.[249] An examination for meaningful participation in management would be broad enough to protect those who have only minimal management participation,[250] but would exclude those who are able to exercise some legitimate control over their situation.[251] At the very least, this standard would require that the individual in question be a voting member of the body making the detrimental decision. If the court wished to be more generous, then a standard

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246. *Serapion*, 119 F.3d at 990.

247. *Schmidt*, 155 F. Supp. 2d at 922.

248. *Id.*

249. Ehrlich v. Howe, 848 F. Supp. 482, 487 (S.D.N.Y. 1994).

250. *See Caruso*, 664 F. Supp. at 150.

251. *See Ehrlich*, 848 F. Supp. at 487.

similar to that employed by the *Ehrlich* court could be used.[252] Such a standard would require that the individual have a realistic opportunity to protect him or herself from the discriminatory practice before being excluded from the protection of the Act.

Such a standard, however, is not without controversy. The first argument against it is that the delegation of management authority alone is enough to indicate ownership status. The problem with this approach is that it fails to examine why the management authority was delegated. For example, if delegation of authority was a requirement for joining the firm, then it would not be indicative of ownership status. After all, "ownership involves the power of ultimate control."[253] Such a situation is not indicative of ultimate control.

The next argument comes from courts which hold that an individual need not exercise complete control in order to be considered an owner.[254] This, however, is not what is being proposed. The proposed standard is requiring, at most, that the individual have a realistic opportunity to protect him or herself from the discriminatory practice (thereby not needing the protections of the Act) and, at the very least, be able to vote on the detrimental decision in question. This standard is in keeping with the remedial purpose of the Act (to protect against discrimination), yet is also restrictive enough to exclude those with the power of ultimate control.[255]

In sum, the proposed test will require evaluation of an individual's remuneration and management authority. The analysis of remuneration will include an inquiry into the percentage of profit sharing in total remuneration, and an inquiry into whether the individual is liable for losses of the firm. Liability for losses, however, should not be determinative if not present. The analysis of management authority will look for meaningful participation in management. At the very least, the individual in question must have a vote on the decision which may be detrimental to him or her before a finding that the individual is an owner and not entitled to protection under the Act. In the absence of clearly determinative findings under the remuneration prong of the test, the analysis of management authority should receive the most weight in the court's analysis.

Turning again to the partner in the opening hypothetical, it is more than likely that he would be able to proceed with his claim if the proposed test were applied to his situation. The extent of his profit sharing as a percentage of total remuneration is not indicated, but the fact that he did not have a vote in the

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252. *See id.*

253. 3 CAVITCH, *supra* note 48.

254. *See* Serapion v. Martinez, 119 F.3d 982, 993 (1st Cir. 1997); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1401 (11th Cir. 1991).

255. When I reference "the power of ultimate control," I am not suggesting that each business may only have one owner (i.e. the person who can exercise ultimate control). Rather, ultimate control may be spread among a number of owners. The key is to include in that group only those who actually have ultimate control. It stands to reason that if an individual does not have the opportunity to exercise a vote on the decision that may be detrimental to him or her, then that person does not have the power of ultimate control.

decision which led to discrimination against him would probably be determinative.

### *C. Application of the Test to Partnerships, Professional Corporations, and Limited Liability Companies*

Because the proposed test does not rely on labels or business forms, it may be easily applied to any of the currently popular business forms for professionals, and should have significant shelf life for use on whatever business forms the future may hold. Regardless of how a business is organized, there will always be some form of remuneration for workers and some arrangement for management authority. These, of course, are the elements which the proposed test examines.

For example, if a LLC was organized so that management authority was vested in a central decision-making body, those members who did not participate in the decision-making would probably not be considered owners under the test (absent a clearly determinative finding under the remuneration prong of the test). However, if the LLC was organized so that all members had an equal vote, then they would probably be considered owners, and not subject to the protections of the Act. Using the more liberal standard available under the management prong of the test, the members would have to have a legitimate chance to protect themselves from discrimination. To do so, the LLC would probably need to have either a supermajority provision (so that a minority of voters could veto the proposal) or a limited number of members (so that the member affected by the discriminatory decision could have a legitimate chance of persuading the few votes required to defeat the proposal).

### *D. Application of the Test to Anti-Discrimination Statutes Outside the ADEA*

It has been my general operating premise that a test under the ADEA should have broad standards for management authority not only because of the remedial nature of the Act, but also because of the people the Act was intended to protect. As a worker ages, it is more likely that he or she will gain additional management authority. Given the unique situation of older workers in that respect, a test with a narrow standard for management authority would effectively exclude many of the people the Act was intended to protect.

When fashioning a test under the other anti-discrimination statutes, like Title VII or the ADA, such a premise would not be appropriate. These Acts, however, are still remedial in nature and deserving of a broad interpretation to affect the desires of Congress. The test examines meaningful participation in management. The proposed standard for that element is not so extreme as to include everyone in the Acts, which Congress did not intend, but is not so narrow as to be overly exclusive. It is not out of order to include as owners only those who have the power to exercise ultimate control over the business.

## CONCLUSION

As businesses grow and expand, it is vital that they have some understanding of what their legal obligations are. As the law currently stands, growing businesses, spread across several jurisdictions, could be subject to different rules for the exact same activities. Even within a single jurisdiction, there may be multiple tests for various business forms.

The proposed test would unify the Circuits into a single approach, which could be used on a wide variety of business forms. Further, even though the test was designed with the ADEA in mind, it is fluid enough to be applied to the other similarly worded anti-discrimination statutes. Finally, and most importantly, the test honors the remedial purpose of the ADEA, while still allowing the courts to examine cases on a situational basis, thereby excluding those not properly covered by the Act.

## ADDENDUM

In April 2003, the United States Supreme Court issued its opinion[256] reversing the Ninth Circuit's decision in *Wells v. Clackamas Gastroenterology Assocs, P.C.*[257] In *Wells*, the Ninth Circuit had chosen to follow part of the Second Circuit's approach, adopting the corporate form standard, and decided that a shareholder physician could not be a partner and was therefore an employee under the ADA. In reversing that decision, the Court answered many of the questions plaguing this issue.

Both the corporate form standard and the per se exclusion for partners have now been discarded.[258] In their place, the Court essentially adopted the EEOC's proffered test examining management control and, to a lesser degree, remuneration.[259] There are six specific questions to ask when making the determination,[260] but the Court's own definition of what an "employer" is (as opposed to an "employee") is more instructive. "[A]n employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire

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256. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 123 S. Ct. 1673 (2003).

257. The Ninth Circuit's opinion is briefly discussed at *supra* note 170.

258. *Wells*, 123 S. Ct. at 1678 ("asking whether shareholder-directors are partners—rather than asking whether they are employees—simply begs the question").

259. *Id.* at 1680.

260. Those six factors are:

> (1) Ability of the organization to hire or fire the individual or set work rules and regulations; (2) Whether and, if so to what extent the organization supervises the individual's work; (3) Whether the individual reports to someone higher in the organization;( 4) Whether and, if so to what extent the individual is able to influence the organization; (5) The existence of written agreements or contracts indicating the individual's employment status; and (6) Whether the individual shares in the profits, losses, and liabilities of the organization.

*Id.* It is important to note, however, that the Court essentially discounted the fifth element as it recognized that the title given to a party should not be determinative. *Id.*

and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed."[261] This, of course, is an accurate description of what an employer is, but within the context of determining employee or ownership status, modern business forms will present many challenges to evaluators using the Court's test.

As the Court recognized, because of the intricacies and complexities of modern business organization, making a determination purely based on title or position is useless.[262] Also because of those intricacies and complexities, a person labeled as partner, shareholder, or member, may very well meet some of the Court's indicia of ownership, but not all. In such a case the issue then becomes where to draw the line.

It is not necessary to rehash the lengthy discussion regarding a broad interpretation of the ADEA and the other anti-discrimination statutes, but the reasoning still applies. The Court has hopefully set out a workable test for distinguishing between employees and owners.[263] The real issue now is what standards should be applied in using the Court's test. It would be relatively simple for the Seventh Circuit to take the Court's test and apply a very narrow standard and for the Second Circuit to take the Court's test and continue using a broad standard, and we would basically be back where we were before the Court issued its ruling. Every jurisdiction would be applying the same test, but they would all be interpreting it differently.

The standards proposed in Part IV of this Note were to be used in a test that examined remuneration and management authority. The Court's test is slightly more expansive than the test proposed herein,[264] but the standards suggested are still applicable.

Essentially, the standard proposed in this Note would only exclude from coverage those who are able to exercise the power of ultimate control, either individually or in a group. Such power is determined by examining whether the individual is able to have meaningful participation in management. At the very least, a person with meaningful participation in management will have the ability to have some control over whether a discriminatory practice will be adopted by the firm. Even if the individual reports to no other person in the firm;[265] even if the individual has complete discretion over his or her work;[266] even if the

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261. *Id.*

262. *Id.* at 1678.

263. The Court references the difference between employers and employees, but in the context of a partnership, PC, or LLC, the employers are necessarily also the owners. This may not be true in a typical corporation, particularly one which is publicly held, but here it is appropriate to use employer and owner interchangeably.

264. The Court's test also examines supervision over the individual and the organization's ability to terminate the individual. *Wells*, 123 S. Ct. at 1680. However, it could be argued that if a person can be discharged at will, then they probably do not exercise the power of "ultimate control."

265. This is the Court's third factor. *Id.*

266. This is the Court's second factor. *Id.*

individual shares in some profits of the organization;[267] if that individual has no say in his or her fate or in the decisions of the organization, then that individual cannot exercise the power of ultimate control. Ownership, in this context, must involve the power of ultimate control.[268]

267. This is the Court's sixth factor. *Id.* However, an individual who shares completely in profits and losses of the firm may be an owner, even without management participation, if it was freely surrendered. 3 CAVITCH, *supra* note 48.

268. 3 CAVITCH, *supra* note 48.

# IN CIVILIAN DRESS AND WITH HOSTILE PURPOSE*

# THE LABELING OF UNITED STATES CITIZENS CAPTURED ON AMERICAN SOIL AS ENEMY COMBATANTS: DUE PROCESS VS. NATIONAL SECURITY

JARED A. SIMMONS**

## INTRODUCTION

The September 11, 2001 attacks on the United States by the terrorist group al Qaeda were unprecedented in both scale and destruction.[1] The events of that day are so ingrained in the memory of the world that recounting them would be superfluous. The attack was not only catastrophic in terms of destruction and loss of life, but also demonstrated that America is vulnerable to large-scale terrorist attacks. There is no reason to believe that the September 11, 2001 attacks were isolated incidents; similar attacks are probable in the future.[2]

With the sobering idea that our borders no longer provide a barrier to acts of terrorism and that we can be attacked without notice, not by a recognizable foreign army, but by an organized group of people that can assimilate into American society, our government has taken steps to minimize the possibility of future terrorist attacks. Visible steps have been taken, including military operations in Afghanistan and Iraq, to limit our exposure to future attacks.

Another step that has been taken is to detain individuals who pose a threat to national security. Attorney General John Ashcroft told U.S. attorneys to "neutralize potential terrorist threats by getting violators off the streets by any lawful means possible, as quickly as possible. Detain individuals who pose a national-security risk for any violations of criminal or immigration laws."[3] When the requisite amount of evidence is not available to formally charge someone with a crime, the government has taken alternative paths to ensure the continued

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* *Ex parte* Quirin, 317 U.S. 1 (1942). This phrase was used by the *Quirin* Court to describe the Nazi saboteurs who had surreptitiously entered the United States to destroy munitions plants.

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1. As of November 17, 2003, there were 2948 confirmed dead, twenty-four reported dead, and twenty-four reported missing. September 11, 2001 Victims, *available at* http://www.september11victims.com./september11victims/statistic.asp.

2. Senator Bob Graham, D-Florida and chairman of the Senate Intelligence Committee, warned, "There is a likelihood almost to the point of certainty . . . that there will be another terrorist attack inside the U.S." Kelly Wallace, *Lawmakers Say New Terrorist Attack Almost Certain, at* http://www.cnn.com/2002/ALLPOLITICS/05/20/terror.threats/index.html (May 20, 2002).

3. Jess Bravin & Gary Fields, *Zero-Tolerance Approach to Terrorism Is Being Tested: New Emphasis on Making Pre-Emptive Arrests May Not Meet Tougher Standards in Court*, WALL ST. J., Oct. 8, 2002, at A4.

detention of people who pose a possible threat to our national security.[4]

A more dramatic maneuver, however, has been the President's controversial decision to label American citizens as "unlawful enemy combatants" ("enemy combatants").[5] The President's power to classify an individual as an enemy combatant during a time of war comes under the President's war powers as provided by Article II of the U.S. Constitution.[6] Historically, people who were captured in the theater of war could be classified as enemy combatants and detained without formal criminal charges, without access to an attorney, and without a scheduled trial.[7] President Bush and his administration argue that the magnitude of risk posed by terrorism allows the Executive to label a citizen of the United States that poses a risk to national security an enemy combatant.[8] Further, the Executive Branch argues that there should be no judicial oversight of such determination besides habeas review, even when that individual is captured inside the United States.[9]

The President's power to declare a United States citizen an enemy combatant is disputed due to the evisceration of that person's due process rights.[10] The concern is heightened when the person so labeled is an American citizen captured on American soil. This Note focuses on the case of Jose Padilla, an American citizen by birth, who was arrested at Chicago O'Hare International Airport on May 8, 2002, after returning to the states on a flight from Pakistan.[11]

Padilla's case should be distinguished from the case of Yaser Hamdi, who was captured in Afghanistan fighting with al Qaeda forces. Hamdi was captured in the zone of military combat as opposed to being captured on American soil like Padilla.[12] As the Fourth Circuit stated, "To compare this battlefield capture [of Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges."[13] Although the President has only declared two American citizens as

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4. Detaining people as material witnesses is one such alternative the government has implemented in order to detain and question individuals who are deemed possible national security risks. *See* Tom Jackman & Dan Eggen, *Combatants' Lack Rights, U.S. Argues*, WASH. POST, June 20, 2002, at A1.

5. *See id.*

6. *See Ex parte* Quirin, 317 U.S. 1, 26-27 (1942).

7. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

8. Katharine Q. Seelye, *Threats and Responses: The Detainee*, N.Y. TIMES, Oct. 28, 2002, at A13.

9. *Id.*

10. *See* AM. BAR ASS'N, TASK FORCE ON TREATMENT OF ENEMY COMBATANTS: PRELIMINARY REPORT (Aug. 8, 2002) [hereinafter AM. BAR ASS'N, TASK FORCE], *available at* http://abanet.org/adminlaw/fall02/natl_sec_enemy_combatant_tf_report_rev.pdf; Dan Eggen & Susan Schmidt, *"Dirty Bomb" Plot Uncovered, U.S. Says; Suspected Al Qaeda Operative Held as "Enemy Combatant,"* WASH. POST, June 11, 2002, at A1.

11. Eggen & Schmidt, *supra* note 10.

12. Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003).

13. *Id.* at 344.

unlawful enemy combatants, the administration plans on continuing to do so in the future.[14]

Jose Padilla allegedly trained with al Qaeda forces and made plans to detonate a radioactive device ("dirty bomb") in the United States.[15] Like multiple others after the 11th of September, Padilla was originally detained on a material witness warrant. Prior to the deadline for making formal charges which would allow for the detention of Padilla, President Bush wrote an order stating that Padilla "represents a continuing, present and grave danger to the national security [and] it is in the interest of the United States . . . [to] detain Mr. Padilla as an enemy combatant."[16]

Attorneys, civil rights groups, and other similarly concerned Americans have characterized the President's action in this regard as an impingement on the constitutional rights of U.S. citizens and an over-expansion of the President's powers.[17] These dissenting arguments are based primarily on the constitutional due process rights[18] that all American citizens inherently possess and 18 U.S.C. § 4001, which states that an American citizen cannot be detained by his own government except through an act of Congress.[19]

This Note proposes that the President is acting within his constitutional powers to declare a citizen of the United States an enemy combatant and that 18 U.S.C. § 4001 does not preclude such action. Nevertheless, when the person labeled an enemy combatant is a United States citizen taken captive within our borders, particularly with the amorphous scope and time-frame of the war on terrorism, there needs to be some degree of due process rights accorded to that individual. Part I of this Note focuses on the source of the President's power to

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14. Seelye, *supra* note 8, at A13.

15. Although this is the general assertion of Attorney General Ashcroft, there are other less menacing reports about Padilla's purported plans. An intelligence official said Padilla's research consisted of surfing the internet and "Deputy Defense Secretary Paul Wolfowitz said[, 'There] was not an actual plan. We stopped this man in the initial planning stages.'" Carla Anne Robbins et al., *Homegrown Threat: Arrest of "Dirty Bomb" Suspect Stirs New Fears About al Qaeda*, WALL ST. J., June 11, 2002, at A1.

16. June 9, 2002 Order by President George W. Bush Declaring Jose Padilla an Enemy Combatant, *available at* http://news.findlaw.com/cnn/docs/padilla/padillabush60902det.pdf. Despite President Bush's assertion, there are questions about the veracity of the information gained by informants and the legitimacy of the charges against Jose Padilla. The United States government concedes that its intelligence sources have not been completely candid about his association with al Qaeda and his alleged terrorist activities. The government concedes that some information provided by the sources remains uncorroborated and may be part of an effort to mislead or confuse U.S. officials. *Alleged but Not Proven*, WASH. POST, Sept. 1, 2002, at B6.

17. *See* Charles Lane, *Debate Crystallizes on War, Rights: Courts Struggle over Fighting Terror vs. Defending Liberties*, WASH. POST, Sept. 2, 2002, at A1. President Bush "stands accused of usurping powers not conferred upon him by the Constitution and of infringing upon individual freedoms." *Id.*

18. U.S. CONST. amend. V, § 1.

19. 18 U.S.C. § 4001 (2000).

declare an individual an enemy combatant and relevant case law that supports such action. Part II looks at the potential limitations to the president's power, including the Fifth Amendment to the Constitution and 18 U.S.C. § 4001. Part III looks at what habeas review has entailed in the cases of Padilla and Hamdi, and what it should entail for a citizen labeled an enemy combatant captured on American soil. Part IV discusses the need for a maximum detention period, with Part V focusing on the appropriate venue for the eventual trial of an enemy combatant such as Padilla.

Henry David Thoreau stated in *Civil Disobedience* that "[t]he government itself, which is only the mode which the people have chosen to execute their will, is equally liable to be abused and perverted before the people can act through it."[20] Although it does not appear that the President is presently abusing his power to declare an individual an enemy combatant, proper legislation will help temper the possibility of any future abuse while also providing adequate due process protection.

## I. THE PRESIDENT'S POWERS

### *A. The Power to Protect*

The President can act without a congressional order to protect people, national security, or things of national interest.[21] Under Article II, Section 2 of the Constitution, the President is declared the Commander in Chief of the Army and Navy of the United States.[22] The authorization granted by Article II and further developed by Supreme Court decisions gives the President the power to take necessary actions to protect the United States in times of war as well as in times of peace. Furthermore, the Constitution assigns the "power [to] the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety."[23]

The ability to protect American citizens from terrorist attacks must initially

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20. HENRY DAVID THOREAU, CIVIL DISOBEDIENCE 1 (1849).

21. In *In re Neagle*, 135 U.S. 1 (1890), the Court noted that the Constitution confers a duty on the President to "take care that the laws be faithfully executed." *Id.* at 64 (quoting the U.S. Constitution). The court then goes on to question the boundaries of this duty:

> Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

*Id.* In answering this question, the Court found that the President's power to protect citizens and national interests arose from the Constitution and was not limited by acts of Congress. *Id.*

22. U.S. CONST. art. II, § 2, cl. 1.

23. Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring).

rest with the President.[24] In *Durand v. Hollis*,[25] the court noted that violence abroad against citizens and their property required prompt and decisive action. The court noted that "[a]cts of lawles [sic] violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for;" and thus, the Executive Branch is empowered to react quickly and effectively in order to protect American interests.[26]

Further, the President's decision regarding how to protect the nation requires significant deference. In the *Prize Cases*, prior to the Civil War, President Lincoln ordered the blockade of southern ports and seizure of several ships in those ports. The Court found that as Commander in Chief, the President had inherent authority to determine what situations necessitated the use of force to protect the nation, even absent Congressional approval.[27]

The Constitution gives the President power to protect the country and its citizens. Moreover, the Supreme Court has determined that the President's determination regarding national safety should be accorded a significant amount of deference. The case law outlines specific examples in which the President has acted within his constitutional authority, even without congressional approval, to ensure that America is protected. In the case of terrorism, the word itself implies acts not fully anticipated or provided for that result in harm. In such case, the President has constitutional authority to respond promptly to protect the citizens of this nation.

### *B. The President's Power to Declare a United States Citizen an Enemy Combatant*

An unlawful belligerent is someone that does not openly carry a weapon, does not wear a fixed symbol that is recognizable at a distance, and does not follow the laws of war.[28] Unlawful belligerents who enter our country under the direction of armed forces of the enemy, for the purpose of inflicting harm upon our property or persons, commit a hostile, war-like act,[29] and they can be subjected to the laws of war.[30] Thus, they can be labeled as enemy combatants regardless of whether they carried conventional weapons or whether they intended to directly oppose the American military.[31]

Although the war on terrorism is not a traditional war, it is a conflict that has involved American troops being deployed to foreign soil to protect the United States and has required homeland security to be ever vigilant. Moreover, when a person begins to take positive steps toward performing a terrorist act, especially

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24. *See* Katyal & Tribe, *supra* note 7.
25. 8 F. Cas. 111, 112 (C.C.N.Y. 1860) (No. 4186).
26. *Id.*
27. The Prize Cases, 67 U.S. 635 (1862).
28. *See* Katyal & Tribe, *supra* note 7, at 1264.
29. *Ex parte* Quirin, 317 U.S. 1, 36-37 (1942).
30. *Id.* at 37.
31. *Id.*

when done with the support of a terrorist organization like al Qaeda, that person is undertaking a war-like act, thus subjecting them to the penalties that come with violating the laws of war.

The President can label foreign or domestic individuals who are bent on inflicting harm through war-like acts as enemy combatants. Nevertheless, the President's authority to exercise his war powers in times of an undeclared war has been questioned recently and in the past. The "Steel Seizure" Case was one of the most famous cases to address this issue. In the Steel Seizure Case,[32] President Truman attempted to take control of the steel mills by Executive order. President Truman claimed that this action was necessary because the impending strike of the steelworkers endangered the making of arms and their shipment to our troops in Korea. The Court rejected the President's argument.[33]

The Court's primary reason for rejecting the President's action was that it was in direct conflict with a specific act of Congress. The Court stated that to allow the President to seize control of the steel mills in direct contradiction of congressional action would "disrespect the whole legislative process and the constitutional division of authority between President and Congress."[34]

The Court did not accept the President's claim that the powers vested in him by the Constitution allowed him to seize the mills. In his concurring opinion, Justice Jackson outlined the spectrum of the President's power. The President's powers are the greatest when Congress has acted conferring upon the President express or implied authority to act. Powers are the least when the President takes measures incompatible with the acts of Congress, and when the President acts in the absence of congressional grant or denial, he can only rely upon his own independent powers obtained from the Constitution.[35]

In the Steel Seizure Case, the President acted in direct contravention of Congress. Congress had already acted and denied the President the power to unilaterally seize control of the steel mills. Even though the production of steel was important to national safety, the Court ruled that he did not have the power to supersede a direct act of Congress.[36]

In the case of enemy combatants, Congress Joint Resolution 107-40 can be seen as either granting the President the authority to act or as remaining silent on this issue, but Congress definitely has not acted to deny the President the power to declare an individual an enemy combatant. The resolution authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided

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32. Youngstown Sheet & Tube Co. v. Sawyer ("The Steel Seizure Case"), 343 U.S. 579 (1952).

33. *Id.* at 710.

34. *Id.* at 609 (Frankfurter, J., concurring). *But cf. In re* Neagle, 135 U.S. 1 (1890).

35. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-36.

36. *Id.* at 602-03. However, Justice Jackson also stated in his concurring opinion that a state of war may exist without a formal declaration from Congress. Therefore, it is important to recognize that the Court did not rule that the President was without power to determine when a state of war existed. *Id.* at 642.

the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts . . . against the United States."[37] The resolution can be broken down into two relevant parts. First, the nation, organization, or person against whom force is being used had to be involved in the September 11, 2001 attacks. Second, force can be taken against these individuals in order to prevent future acts of terrorism against the United States.

If the President confined Padilla in order to prevent him from committing a future act of terrorism, the *second* part of the Order would be satisfied because the President would be acting to prevent a future act of terrorism. Nevertheless, since there are no allegations that Jose Padilla planned, authorized, committed, or aided in the terrorist attacks on September 11, the *first* part of the Order is not satisfied, and Joint Resolution 107-40 does not apply to him. Therefore, in order to detain an individual as an enemy combatant, the President must rely on his own independent powers because there has been no congressional grant or denial for the President's actions.

Historically, the President had the authority to label individuals as enemy combatants.[38] In *Ex parte Quirin*,[39] the issue was whether the President had the power to order enemy soldiers who had surreptitiously entered the country for the purpose of exploding munitions plants to be tried by military tribunals.[40] The Court found that the President had such power because these combatants had violated the laws of war by entering our country under the guise of being American citizens with intention of inflicting harm on our industry and people.[41] Another issue in *Quirin* was whether a U.S. citizen could be properly tried before a military tribunal, as that forum did not provide the full spectrum of due process rights. However, the Court ruled that U.S. citizenship does not relieve a person from the consequences of his or her actions that were in violation of the laws of war.[42]

The facts of the Padilla case are similar to *Quirin*. Jose Padilla was arrested at O'Hare International Airport in Chicago, Illinois after returning from allegedly training with al Qaeda forces in Afghanistan. Reportedly, while in Afghanistan he had learned how to build and detonate a radioactive dispersive device, or dirty bomb.[43] Upon returning to the states, Padilla allegedly planned to detonate such a bomb in a heavily populated area.[44]

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37. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

38. *See* Katyal & Tribe, *supra* note 7.

39. 317 U.S. 1 (1942).

40. *Id.* at 15.

41. *Id.*

42. *Id.* at 37-38.

43. A dirty bomb is a dispersive device designed to scatter radioactive material into the surrounding environment using conventional explosives.

44. *But see* Robbins et al., *supra* note 15.

Although some U.S. officials, including U.S. Attorney General John Ashcroft, said that Mr. Padilla researched dirty bombs in Lahore, Pakistan, an intelligence official said his

Similar to the German soldiers in *Quirin*, Padilla had entered the United States, dressed as a regular citizen, allegedly under the direction or influence of al Qaeda. He planned to detonate a dirty bomb that would cause painful deaths and tremendous destruction. Although Padilla had no plans to encounter military forces in performing this terrorist attack, this would not take his actions out of the zone over which the military can exercise its authority. As the Court in *Quirin* stated, "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of . . . the law of war."[45]

Padilla's situation differs from *Quirin* because the defendants in *Quirin* were soldiers of a recognized army that the United States had formally declared war against, and they made no contrary assertions regarding that fact. Padilla does not belong to a recognized army, thereby making it more difficult to clarify the association. However, intelligence gathering sources provided the government information that revealed Padilla trained with a regime intent on attacking America and her interests through terrorism.[46] Being closely associated with terrorists to the point of training with them and being included in their plans is similar to being part of an organized army intent on destroying its enemies.

In contrast, compare *Quirin* to *Ex parte Milligan*.[47] In *Milligan*, which occurred during the Civil War, a southern sympathizer residing in Indiana was detained and tried by military tribunal for allegedly conspiring against the United States. The Court held that Milligan was not an enemy belligerent and therefore could not be tried by a military tribunal because he was not a part of or associated with confederate forces.[48] By itself, sympathizing with the enemy is not enough to declare an individual an enemy combatant.

Nevertheless, Padilla's close association with al Qaeda significantly departs from the facts in *Milligan*. Padilla is known to have associated and trained with al Qaeda leaders and their associates in Pakistan.[49] Therefore, the necessary foundation exists for which the President can declare Padilla an enemy combatant.

## II. POTENTIAL LIMITS ON THE PRESIDENT'S POWER

### *A. 18 U.S.C. § 4001*

Objectors to the President declaring a U.S. citizen an enemy combatant and

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research consisted of "basically surfing the Internet" for information on the crude devices. Deputy Defense Secretary Paul Wolfowitz said, "[T]here was not an actual plan. We stopped this man in the initial planning stages."

*Id.*

45. *Ex parte* Quirin, 317 U.S. 1, 37-38 (1942).
46. Eggen & Schmidt, *supra* note 10.
47. 71 U.S. 2 (1866).
48. *Id.* at 135-36.
49. Seelye, *supra* note 8, at A13.

the subsequent detainment of such person have relied on 18 U.S.C. § 4001 to assert that the President is acting contrary to an act of Congress.[50] The statute reads, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[51] Opponents say this Act is in direct conflict with the President's actions; therefore, the President's ability to declare a United States citizen an enemy combatant is contrary to an act of Congress and, as such, is invalid.[52]

Section 4001 does not limit the President's ability to classify a U.S. citizen an enemy combatant. First, the statute does not apply to enemy combatants because they are outside of the statute's scope and intended use. Second, it can be argued that the congressional order authorizing the President to use force provides the congressional authorization necessary under the statute; however, this second argument fails for reasons discussed below.

The best argument against the application of this statute, due to the subsequent ramifications and its strength, is that the declaration of a person as an enemy combatant is outside the scope of 18 U.S.C. § 4001. Title 18 is titled "Crimes and Criminal Procedure," and § 4001 is subtitled "Limitation on detention; control of prisons." From its title alone, it is a reasonable interpretation to conclude that Congress intended this statute to apply to criminal detainment, not to military detainment.

The Second Circuit gave considerable weight to the legislative history of § 4001 in concluding that this Act applied to both criminal and military detainment. The court determined that the majority of legislatures favored the act due to the treatment of Japanese-Americans in World War II.[53] Moreover, the court asserted that the legislature considered that this Act would not allow the President to detain an individual that was suspected of possible future acts of sabotage or espionage.[54] Nevertheless, the legislative history of § 4001 does not indicate that Congress intended the President to be stripped of his ability to protect the country from acts of terrorism.

The only time this statute was addressed by the Supreme Court was when a state prisoner was going to be transferred to federal prison.[55] In that case, the Court stated in a footnote, "the plain language of § 4001(a) proscrib[es] detention

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50. The Second Circuit held that 18 U.S.C. section 4001(a) prevents the President from being able to hold Padilla as an enemy combatant and ordered the release of Padilla from military custody within thirty days of their ruling. Padilla v. Rumsfeld, No. 03-2235(L), 2003 WL 22965085, at *16 (2d Cir. 2003). The Justice Department has appealed that case to the Supreme Court and asked the Second Circuit's order to be stayed. *See* Anne Gearan, *White House Appeals Terror Suspect Case*, Jan. 16, 2004, *available at* http://news.findlaw.com/scripts/printer_friendly.pl?page=/ap_stories/a/w/1154/ 1-16-2004/20040116181501_04.html.

51. 18 U.S.C. § 4001(a) (2000).

52. AM. BAR ASS'N, TASK FORCE, *supra* note 10. *See also* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 598 (S.D.N.Y. 2002).

53. *Padilla*, No. 03-2235(L), 2003 WL 22965085, at *14.

54. *Id.*

55. Howe v. Smith, 452 U.S. 473 (1981).

of *any kind* by the United States, absent a congressional grant of authority to detain."[56] However, the sentence should be read within its context; this was a criminal case. The Court could not have intended this sentence to prevent the President from acting under his constitutional duty to protect the nation's security. The Court in this case did not even have reason to contemplate such a drastic proposal; therefore, such an interpretation is not supportable.

Moreover, the statute implicitly exempts matters involving the military. Section (b)(1) gives the Attorney General control over federal penal and correctional facilities, but explicitly exempts military and naval institutions from that control. Therefore, this express limitation of the statute supports the proposition that it does not apply to events or happenings related to the military.

Also, if the statute limited the President's ability to make urgent decisions regarding terrorists, it would impinge on the President's role as Commander in Chief. Where a citizen has taken positive steps towards committing a terrorist attack against the United States, the President must be able to respond appropriately. This statute should not be interpreted to prevent the President from performing his constitutional duties.[57]

The second argument against applying § 4001 is that section 2(a) of the Authorization for Use of Military Force provides the congressional authority necessary to allow the President to detain enemy combatants. The Order allows the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons . . . .[58]

Although this argument provides an easier way to deal with § 4001, and is also the way the court circumvented this problem in *Padilla*,[59] it is incorrect.

This Order does not apply to individuals that did not participate, plan, authorize, or assist in the September 11 attacks. For this Order to apply to

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56. *Id.* at 480 n.3 (emphasis in original).

57. Making a similar argument the government in *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 597-98 (S.D.N.Y. 2002), argued a constitutional avoidance theory. Instead of arguing that the statute was unconstitutional, the government argued that the statute does not apply to the detention of enemy combatants. Judge Mukasey denied this argument and instead relied solely on the plain language of the statute. *Id.*

58. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

59. According to Judge Mukasey, "If the Military Force Authorization passed and signed on September 18, 2001, is an 'Act of Congress,' and if it authorizes Padilla's detention, then perforce the statute has not been violated here." *Padilla*, 233 F. Supp. 2d at 598. The judge found that the Order was an act of Congress and that the detention of Padilla was not barred by 18 U.S.C. § 4001(a). *Id.*

Padilla, the government would have to show that he assisted in the September 11 attacks. The government, however, has not accused Padilla of playing a role in the September 11 attacks; at least, they have not publicly done so.

Also, and more importantly, for possible future cases of domestic terrorism further removed from September 11, it is necessary to interpret 18 U.S.C. § 4001 as either unconstitutionally impinging the Presidential national security powers, or as not applying to citizens that participate in terrorist activities against their country. If the statute is not interpreted in this manner, the statute limits the President's ability to protect the safety of our nation in the future.

### *B. Due Process v. National Security*

Since an enemy combatant can be detained until the end of the war or conflict without formal charges or access to an attorney,[60] one argument against labeling a U.S. citizen an enemy combatant is that it allows indefinite detainment of the individual without due process of law. There are times, however, when constitutional requirements must bend to the necessity of protecting the country. In fact, case law supports that due process rights can be diminished when the magnitude of the situation calls for such action.[61]

In *Moyer v. Peabody*, the Governor of Colorado had the leader of an uprising arrested and detained from March 30 until June 15, the time when the uprising was put down. The detained individual later sued the Governor for detaining him without due process of law. The Supreme Court discussed what due process required. Foremost, the Court noted that due process "varies with the subject-matter and the necessities of the situation."[62] When a state is threatened, individual rights yield to the preservation of the state.[63] Therefore, when an emergency situation arises, the head commander, whether the Governor of a state or the President of the United States, has the ultimate determination what actions are needed to preserve the integrity of their state or country.[64]

*Sterling v. Constantin* has a fact pattern similar to *Moyer*, but a divergent holding. In *Sterling*, the Governor declared a state of insurrection based upon the fact that he believed if he did not do so there would be an insurrection.[65] In *Moyer*, the court noted that the decision made by the state's executive was unreviewable; however, the court in *Sterling* indicated that the Court could review the Governor's decision. The Court noted that they did not have to accept the Governor's decision just because it is presumed that he acted in good faith,

> [i]t does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress

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60. Katyal & Tribe, *supra* note 7.

61. *See* Sterling v. Constantin, 287 U.S. 378 (1932); Moyer v. Peabody, 212 U.S. 78(1909).

62. *Moyer*, 212 U.S. at 84.

63. *Id.*

64. There was no claim made that the Governor acted in bad faith or that the imprisonment of the detainee lasted longer than the time it took to put down the insurrection. *Id.*

65. *Sterling*, 287 U.S. at 378.

> disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat.[66]

Therefore, this ruling requires the executive to show some necessity, beyond a good faith subjective belief, to demonstrate the need for detention.

In *United States v. Salerno*, the Court upheld the Bail Reform Act of 1984 which allowed the government to detain an arrestee pending trial if the government demonstrated by clear and convincing evidence, after a hearing, that no conditions of release on bail could assure public safety.[67] The Court stated that being detained is not the same as being punished. Further, the Court noted that in appropriate circumstances community safety outweighs an individual's due process rights. The Court must determine if the circumstance was appropriate for detaining the accused criminal, and the prosecution must prove their allegations by clear and convincing evidence.[68] The Court outlined the factors to consider for detainment which included: the nature and seriousness of the charge, the substantiality of the government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the arrestee's release.[69] *Salerno* shows that due process rights can be abbreviated in situations that create a high probability of danger to the public.

Also, note that *Salerno* involved a criminal trial. It is thought that domestic criminals are afforded the full amount of due process protection under the Constitution. If due process rights can be abridged in a criminal scenario because of concerns of public safety, then due process can be limited to protect national security. The danger and subsequent destruction from another internal terrorist attack far outweighs the possible danger Salerno posed to his local community. The case law does not explicitly state that the President can detain a citizen of the United States without due process of law. The case law, however, demonstrates that the President is acting within his power as Commander in Chief to defend the country from imminent threats.

Nevertheless, due to the incredible power the President wields when he declares a United States citizen apprehended on American soil an enemy combatant, and its ramifications, such determination should be reviewed.

## III. THE REVIEW PROCESS

### *A. Habeas Review and the Role of the Courts*

American citizens detained as enemy combatants have been entitled to a writ

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66. *Id.* at 400.
67. 481 U.S. 739, 754-55 (1987).
68. *Id.*
69. *Id.*

of habeas corpus.[70] The two courts that have heard habeas petitions, however, have come to different conclusions on what the court's proper role is in reviewing a habeas petition. The Fourth Circuit Court of Appeals has ruled that the court can only review whether the detention of an American citizen classified as an enemy combatant is in direct conflict with the Constitution or applicable law of Congress.[71] In contrast, the district court for the southern district of New York ruled that Jose Padilla has the right to an attorney in order to help him contest the government's allegations.[72]

Article III courts should limit their review of the enemy combatant label to whether the President acted constitutionally and whether the facts as alleged by the government are enough to detain the individual. The President has the inherent powers given to him by the Constitution that allow him to carry out the duties of his office, which include protecting the country from terrorist attacks.[73]

Article III courts can, however, determine if the President is acting according to the powers vested by the Constitution in the Executive or whether he is overstepping his constitutional boundaries.[74] Therefore, the question for the court reviewing the habeas petition of a U.S. citizen that has been declared an enemy combatant is, "Under these conditions and circumstances was the President's action Constitutional?"[75]

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70. This right has been accorded to both Yaser Hamdi and Jose Padilla. Yaser Hamdi was captured in Afghanistan fighting with al Qaeda forces. After his initial detention in Guantanamo Bay, Cuba, it was realized that Hamdi was an American citizen. Due to that revelation, Hamdi is now being held as an enemy combatant in a naval brigade located in Suffolk, Virginia.

71. Citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers and political branches. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

72. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 605 (S.D.N.Y. 2002). After this ruling, the government has consistently not complied with the court's order to allow Padilla to meet with an attorney. On April 9th, 2003, one issue U.S. District Judge Michael Mukasey certified for interlocutory appeal is whether Padilla is entitled to meet with a lawyer. Padilla v. Rumsfeld, 256 F. Supp. 2d 218, 213 (S.D.N.Y. 2003).

73. *See* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 498 (2002).

74.

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

United States v. Nixon, 418 U.S. 683, 704 (1974) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

75. *See* Korematsu v. United States, 140 F.2d 289, 306 (9th Cir. 1943). "There is no sanction in our governmental scheme for the courts to assume an overall wisdom and superior virtue and take unto themselves the power to vise the Acts of Congress and the President upon war matters so long as such acts are not in conflict with provisions of the Constitution itself." *Id.*

Article III courts would be usurping Presidential authority if they tried to determine the correctness of the President's determination that an individual is an enemy combatant. For the court to try to make this determination, they would be substituting their independent determination in place of the President's. Article II of the Constitution reserves the power to determine what action or reaction war or imminent threats to national security requires to the President. Whether the President's determination is correct, or whether there is an imminent danger that necessitates the action, is a political question that is not appropriate for an Article III court to determine.[76]

*1. Padilla v. Bush.*—In *Padilla v. Bush*, the court determined that the President had constitutional authority to declare Jose Padilla an enemy combatant.[77] This court, however, went on to determine that Padilla should have the opportunity to present his own facts and to contest the facts the government had alleged against him.[78] Despite finding that the Sixth Amendment did not apply, the court still relied on the Sixth Amendment and its own "discretion" to determine that Padilla needed an attorney to help him challenge his detention through a habeas petition.[79] The court stated, "It would frustrate the purpose of the procedure Congress established in habeas corpus cases, and of the remedy itself, to leave Padilla with no practical means" to challenge his detention.[80]

The problem with the district court's contentions is that while allowing the President to declare an individual an enemy combatant, the court strips the label of its intended consequences. Enemy combatants are thus labeled to prevent them from having access to a lawyer and the courts. This allows the government to try to extract valuable information about our enemies and their future plans. Also, terrorists in public courts present a safety issue, not only for the possibility of leaking government information, but also for the safety of the judges.[81]

The court in *Padilla v. Bush* overstepped its judicial boundaries in deciding that Padilla should be allowed to have an attorney available to him to challenge the underlying facts that led to his detention. The determination that an individual is an enemy combatant is a military determination based upon classified information that is provided to the President. The President was given

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76. *See* Ochikubo v. Bonesteel, 60 F. Supp. 916 (S.D. Cal. 1945). For a judge to declare that there was no military necessity would be substituting the judge's decision making for

> the combined intelligence and judgment of Congress, the President, the Secretary of War, the combined Chiefs of the Military Staff of the United States . . . all of whom are charged under our constitutional system with the power and responsibility of not only making the decisions growing out of the power to make war, but with executing them.

*Id.* at 933.

77. *Padilla ex rel. Newman*, 233 F. Supp. 2d at 588-89.

78. *Id.*

79. *Id.*

80. *Id.* at 602.

81. Kenneth Anderson, *What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591, 609 (2002).

the authority under Article II of the Constitution to determine whom to declare an enemy combatant. The Constitution does not provide Article III courts the same authority regarding war.

*2. Hamdi v. Rumsfeld.*—In *Hamdi v. Rumsfeld* the lower court had determined that Hamdi[82] should have unlimited access to an attorney to help him prepare for his habeas review. The Fourth Circuit Court of Appeals reversed the lower court's ruling and found its approach, which was similar to the Southern District of New York's approach, to be incorrect. The court stated:

> The [lower] court's approach, however, had a single flaw. We are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its powers . . . [under] Article II. To transfer the instinctive skepticism, so laudable in the defense of criminal charges, to the review of the executive branch decisions premised on military determinations made in the field carries the inordinate risk of a constitutionally problematic intrusion into the most basic responsibilities of a coordinate branch.[83]

Moreover, the court notes that military actions are not without mistakes; however, these inherent problems are not enough to allow the judiciary to oversee military operations.[84] The Fourth Circuit held that Hamdi was not entitled to challenge the information that the government used to determine that Hamdi was an enemy combatant or to allow him access to an attorney.[85]

An American citizen labeled as an enemy combatant is entitled to habeas review of his or her detention. This review, however, should not include the right to challenge the facts or sufficiency of the President's determination. Besides being an infringement on the President's ascribed constitutional powers, typical Article III courts are not prepared to handle this type of adversarial hearing involving classified information concerning national security. Although Article III courts do not have the power to determine if the President's determination is accurate, they do have the power to determine if the detention of an enemy combatant is lawful under the Constitution and any relevant statutes if the detainee invokes his or her right to habeas review.[86]

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82. As previously discussed, Yaser Hamdi was captured in Afghanistan fighting for al Qaeda. He was originally imprisoned at Guantanomo Bay, Cuba and was transferred to detention in the United States as an enemy combatant after the revelation that he was an American citizen.

83. Hamdi v. Rumsfeld, 316 F.3d 450, 473 (4th Cir. 2000).

84. *Id.*

85. *Id.*

86. *See* Anita Ramasastry, *Do Hamdi and Padilla Need Company?: Why Attorney General Ashcroft's Plan to Create Internment Camps for Supposed Citizen Combatants Is Shocking and Wrong* (Aug. 21, 2002), *at* http://writ.findlaw.com/ramasastry/20020821.html. "At a minimum, Supreme Court precedent shows us that not all military detentions of U.S. citizens that are connected with wartime offenses are lawful; [In Re] Milligan . . . establishes that." *Id.*

### *B. Establishing an Appropriate Review Process*

Although Article III courts should not be able to overrule the President's determination that an individual is an enemy combatant, a review process needs to be established that would provide appropriate safeguards to due process rights and national security. Although the courts do not have the power to decide whether the President was correct in his determination, because the President's and Congress's constitutional war powers overlap, Congress can pass legislation to supplement or curtail the President's power to unilaterally detain an individual indefinitely.

A U.S. citizen captured on American soil should have the ability to have the label of enemy combatant reviewed for the following reasons: first, he or she is a U.S. citizen captured on American soil; second, the zone of armed combat is further removed and less defined on American soil; third, it is more difficult to define an enemy combatant outside the classic theater of war; last, due to these inherent problems it is necessary to provide constitutional, albeit decreased, safeguards to American citizens in this situation.

The possible courts to review the labeling include military tribunals, courts-martial, Article III courts, or another congressionally created court under Article III. The review process should not determine if the individual is actually guilty of terrorist activities. The process should determine if the labeling of the individual is valid. The government should be allowed to detain the individual up to the point of the hearing. This initial detainment period would provide the President means to combat immediate threats to national security. Furthermore, because the President has already acted, presumably in good faith, and because of the magnitude of possible harm from a terrorist attack, the Government should not have to prove its allegations beyond a reasonable doubt.

Prior to the review, the detainee is only an alleged enemy combatant and, theoretically, they have not been found to have violated any laws of war. Because of the location of capture and the extent of his involvement, Hamdi should be considered a combatant in the traditional sense. In *Quirin* it was known prior to the trial by the military tribunal that the individuals were members of the German Army.[87] However, in the case of the U.S. citizen apprehended on American soil, like Jose Padilla, where there is no ongoing combat or a physical attempt at a terrorist attack. The direct connection to the enemy and the battle is more attenuated. Therefore, it becomes necessary to ensure some level of due process to make sure the label is appropriate and was determined by reliance on adequate government information.[88] By reviewing the President's determination that the individual is an enemy combatant, some due process rights are afforded the alleged combatant.

There is an inherent problem in a military tribunal or a courts-martial

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87. *Ex parte* Quirin, 317 U.S. 1, 7 (1942).

88. This begs the question: "What is adequate?" In such a situation, information that can be reasonably relied upon to make determinations of national security is adequate. It would be up to the reviewing judge or officer to determine reasonableness.

reviewing the President's labeling. Neither provides an appropriate forum for review because neither would have jurisdiction over an American civilian at this point. Although military tribunals and courts-martial are created under different constitutional authority,[89] they both require that the individual either be in the military or has violated the laws of war. The review process should be implemented to determine if the President's labeling was valid, therefore, until the label of enemy combatant is verified, the individual cannot be seen to have violated any law of war. There is, however, a presumption created by the President's labeling that the individual is an enemy combatant, but this is not enough to allow a courts-martial or a military tribunal to try the individual.[90] Therefore, neither forum is appropriate for reviewing the labeling of a U.S. citizen as an enemy combatant when that citizen has been apprehended on American soil.

A typical Article III court, although the most independent forum, is not an appropriate forum to review the President's determination, either. According to Kenneth Anderson there are three major reasons why Article III courts are not satisfactory forums to handle terrorism cases.[91] Although Anderson was discussing prosecution of terrorists, the same problems would be applicable to the review process that I am proposing. First, there are evidentiary limitations on what the government would be able to produce at court due to the type of information relied on to make the determination. Also, hearsay statements would not be allowed in an Article III court. This creates practical limitations on admitting information from intelligence gatherers that could not be expected to return for a review hearing or trial. These complications make it more difficult to meet the government's burden of proof, no matter what that standard might be. Second, the government would have to impose restrictions on what they would produce at court because of national security reasons. Information that otherwise might be difficult or impossible for terrorists to obtain would become easily accessible if exposed in open court. This creates a difficult decision for the government, to expose classified information or to fail to protect the nation from a terrorist. Each choice is unacceptable and provides a circular result. Third, Anderson notes that there is a possibility that terrorists or their followers could seek revenge against participants in an Article III proceeding.[92] Due to the preceding reasons, Article III courts do not serve as a good option in reviewing

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89. The constitutional authority for the creation of these two courts came from separate powers. Military tribunals are created by the President through his Article II powers, whereas, Congress was vested with the power to create courts-martial under Article I, Section 8, Clause 14 of the Constitution. Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19 (Mar. 2002).

90. In a criminal format, there is a presumption of innocence that the government has to overcome, whereas in the situation of alleged enemy combatants, the President's initial labeling should allow a presumption in favor of the President's determination.

91. Anderson, *supra* note 81, at 609.

92. *Id.*

the President's determination.

Moreover, although Article III courts do provide the greatest amount of independence of the review options, this independence is somewhat nullified by the fact that the government would be unable to provide the judges reviewing the matter with classified evidence on which to base their decision because of national security concerns. Thus, the court would have to make a decision based on the following: Assuming the government's allegations are true, can the individual be detained as an enemy combatant? This results in a duplication of what a habeas proceeding would entail.

In order to have a meaningful review process, Congress needs to create a review panel similar to those created under the Foreign Intelligence Surveillance Act (FISA).[93] It would benefit this discussion to look at the historical development of FISA. Prior to the FISA review process established by Congress under 50 U.S.C. §§ 1800-1811, the executive branch, under the "national security exception," began conducting electronic surveillance of foreign enemies or their agents within the United States without warrants.[94] This process continued without any challenges from Congress until the Watergate scandal. Moreover, during the time period prior to Watergate, Congress explicitly refused to address the issue of regulating intelligence gathering that involved national security.[95] After Watergate, the procedures used to initiate intelligence gathering received closer scrutiny and the Supreme Court ruled that "national security" would no longer satisfy domestic electronic information gathering without a proper warrant.[96] Due to this ruling, including the Court inviting Congress to pass legislation to control this area, Congress enacted FISA.[97]

FISA designates eleven district court judges to review and grant orders that provide for electronic surveillance.[98] The judges are appointed by the Chief Justice of the United States Supreme Court.[99] FISA provides that judges will not serve more than seven years in this capacity and after their designated period is served, they are not eligible for re-designation.[100]

A FISA judge can grant an order approving the electronic surveillance of a foreign power or an agent of a foreign power[101] based upon information provided

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93. The Foreign Intelligence Surveillance Act was created by Congress in 1978 to review Justice Department applications for secret warrants and issue such warrants for electronic surveillance. 50 U.S.C. § 1800 (2003).

94. United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982) (recognizing that Franklin D. Roosevelt was the first President to assert his executive power in this manner).

95. *Id.* at 1308.

96. *Id.* at 1309.

97. *Id.*

98. 50 U.S.C. § 1803 (2003).

99. *Id.* § 1803(a).

100. *Id.* § 1803(d).

101. 50 U.S.C. § 1801 has multiple ways to define "agent of a foreign power." Section 1801(b)(2)(C) specifically defines "agent of a foreign power" as "any person who knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor for or

by the government.[102] The judge's decision is governed by statutory elements that must be met. Among those is the belief that probable cause exists that the person being targeted is associated with a foreign power. To assist in determining probable cause, the judge may, among other considerations, consider any past or present activities of the target.[103]

FISA and its proceedings have withstood constitutional challenges on Fourth and Sixth Amendment grounds.[104] Furthermore, the statute has withstood challenges that Article III of the Constitution did not give Congress the power to create this type of court because the judges do not have life tenure.[105] However, courts have found that by having life tenure through their federal district court appointments, FISA judges are insulated from political pressure that could improperly affect their impartiality.[106]

Also, FISA judges' neutrality has been questioned and challenged because the FISA courts rarely, if ever, deny a government request.[107] Nevertheless, the federal courts have found the FISA courts to be neutral and effective in the role they play through the procedures legislated by Congress.[108]

Congress should create a court similar to FISA to review the President's determinations that a U.S. citizen is an unlawful enemy combatant. However, there are different individual interests at stake between a person targeted for electronic surveillance and a person that is going to lose all of one's freedoms. FISA involves the targeted individual's privacy interests, whereas in a situation involving enemy combatants, the person's life and liberty interests are involved. Infringing upon a person's freedom of liberty is a more significant infringement on the person's rights than a violation of privacy, which is still a serious violation in its own right. Because this newly legislated court will impact the individual's liberty interests, there may need to be significant changes from how the FISA court functions. The best way to address this due process concern is through a balancing scheme.

Weighing the government's interest against the magnitude of possible loss of the individual's liberty can help determine the appropriate amount of due process that is required. Clearly, an individual has a significant interest in his freedom. Some argue that due process is intended to protect the individual from the group, especially where the individual's loss benefits the group. However, where the right to due process comes into conflict with other rights, the government can seek a proper accommodation between them.[109]

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on behalf of a foreign power." *Id.*

102. 50 U.S.C. § 1804 (2003).

103. *Id.* § 1805.

104. *See* United States v. Ott, 637 F. Supp. 62 (E.D. Cal. 1986); United States v. Megahey, 553 F. Supp. 1180 (E.D.N.Y. 1982); United States v. Falvey, 540 F. Supp. 1306 (E.D.N.Y. 1982).

105. United States v. Cavanagh, 807 F.2d. 787, 791-92 (Cal. 1987).

106. *Megahey*, 553 F. Supp. at 1197.

107. *See id.*

108. *Id.*

109. Notes, *Specifying the Procedures Required by Due Process: Toward Limits on the Use*

The government's interest is national security. To recognize only national security, without more, belies the magnitude of that interest when you consider the devastation and destruction terrorists intend to create.[110] It could be asserted that a citizen of the United States should be able to confront the judge reviewing the President's labeling and present a defense to the labeling because he or she will be denied his or her freedom if the judge upholds the President's label. Nevertheless, because the review should only be to determine if the President had a reasonable basis for labeling the individual an enemy combatant, no purpose is served by allowing the accused an opportunity to rebut the government's allegations. The review is not to provide the alleged terrorist a forum to try his case.

Similar to the FISA courts, the review should take place ex parte and in camera and the judge should be allowed to review the documents that the President relied on to make his determination. Moreover, in order to overturn the President's label, the court should be required to find that there is no foundation for the President's labeling or that the decision was clearly erroneous. The factors employed in *Salerno*, along with FISA, would serve as a good guideline as to what the court should consider, including: the nature and seriousness of the charge, the substantiality of the government's evidence against the person detained, the detainee's background and characteristics, and the nature and seriousness of the danger posed by the detainee's release.[111] By allowing the judge to review secured documents, along with weighing the preceding information, this type of court would be able to determine if the President's determination was valid.

Although the preceding review process does not provide the full spectrum of due process procedures that would be afforded to an accused criminal, it does provide some due process protection to the American citizen that is deemed an enemy combatant by the President. Also, the process would alleviate concern over the President unilaterally making a determination of this magnitude. It is easier to accept the labeling of Hamdi, or another citizen captured on the battlefield, as an enemy combatant because this fits into the usual war paradigm. However, the danger of terrorism is that it festers outside of this traditional paradigm, thus requiring proactive measures. If more American citizens are labeled enemy combatants in the future, a review panel, like the one proposed, would not only provide some due process rights to the detainee, but would also give a joint validation from the three branches of government working together.

## IV. THE NEED FOR LIMITING THE PERIOD OF DETAINMENT UNDER THE ENEMY COMBATANT LABEL

Due to the fact there is no foreseeable end to the war on terrorism, the detention of an enemy combatant could theoretically be without end. Because

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*of Interest Balancing*, 88 HARV. L. REV. 1510, 1527 (1975).

110. *See* Wallace, *supra* note 2.

111. *See* 50 U.S.C. § 1800 (2003); United States v. Salerno, 481 U.S. 739 (1987).

this possibility exists, Congress should pass legislation limiting the length of time an individual may be detained.[112] An appropriate amount of time for detention could be difficult to formulate. The purpose of the detention is to try to extract valuable information about the terrorist network and possible plots against the United States. Obtaining this information would not be an easy task, and it undoubtedly involves some tactical and psychological maneuvering.

Therefore, although a limitation on the period of detention should be implemented, it is beyond the scope of this paper to propose what a reasonable amount of time for detention would be. The key in this formulation, however, is that the detention cannot evolve from detention for security and safety reasons to detention as punishment.[113] Once the detention moves into the realm of punishment, the executive branch has crossed its constitutional boundaries.[114] At the end of the detention period, the government would either have to release the detainee or, under the more likely scenario, have to charge the detainee with a war crime.

## V. THE APPROPRIATE FORUM FOR A TRIAL OF AN ENEMY COMBATANT WHO IS AN AMERICAN CITIZEN

At the end of the detention period, the enemy combatant will have to be released or brought to trial. Since it is unlikely that the government will want to release an individual that has planned or participated in terrorist attacks against our country, it is logical there will be a trial. Therefore, there is a need to determine what the appropriate forum is in which to try an American citizen labeled an enemy combatant.

As discussed earlier, a typical Article III court provides the most independent judicial body; however, due to the previous explanation, along with the following, this forum is not a viable option. An Article III court does not provide a deterrent to terrorism.[115] As seen in the few trials involving terrorists, it provides a multitude of procedural problems that the system is unable to properly control.[116] Furthermore, it provides a stage upon which the terrorist can continue

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112. A current bill proposes the President be given congressional authority to classify citizens as enemy combatants. The bill proposes that the President certify an individual as an enemy combatant every 180 days, and provide a report to Congress not less than once every twelve months. Also, the bill provides for a termination of the authority provided for on December 31, 2005. H.R. 5684, 107th Cong. (2001). The bill, however, does not clarify if any enemy combatants detained on December 31, 2005 can no longer be detained, or if the termination just applies to any subsequent action. Because the bill, as currently written, could be interpreted as only terminating any future detainments, the enemy combatants already detained could possibly be held indefinitely.

113. *See Salerno*, 481 U.S. at 739; Katyal & Tribe, *supra* note 7.

114. *Salerno*, 481 U.S. at 746-48.

115. Anderson, *supra* note 81.

116. *See* Joanne Mariner, *A Fair Trial for Zacarias Moussaoui*, Feb. 3, 2003, *available at* www.cnn.com/2003/LAW/02/03/findlaw.analysis.mariner.moussaoui/index.html. The judge in the lower court ordered Moussaoui, a suspected terrorist co-conspirator in the September 11 attacks,

to voice his or her beliefs or viewpoints to the United States and its people.[117] Our criminal justice system works because there is a respect for the rights that people are allowed to challenge under the Constitution.[118] However, the American criminal system:

> treats crime as a deviation from the domestic legal order, not fundamentally an attack upon the very basis of that order .... Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial.[119]

Regardless, because the detainee was labeled an unlawful enemy combatant, and a reviewing body upheld this labeling, the matter is now appropriately under the laws of war. Violations of the laws of war can be tried by military tribunals or a courts-martial.[120]

Although it can be argued that the President or Congress could determine that a military tribunal should try the enemy combatant, it does not appear to be an appropriate choice. The President's authority to create a military commission is concurrent with Congress; therefore, congressional action or inaction can influence the President's ability to create a military commission[121] to try American citizens as alleged enemy combatants. Although a military tribunal tried the combatants in *Quirin*, America was in a declared war with Germany and those detained were actual members of the German army.[122] Furthermore, and just as important, the Supreme Court did not decide whether the President independently could create a military commission without the support of Congress because in that case Congress had authorized the use of commissions to try crimes against the laws of war.[123] In contrast, the President's order, which Congress supported, to try terrorists by military tribunal did not include U.S. citizens. Accordingly, it cannot be argued that Congress has authorized the President to use military tribunals to try an American citizen for being an unlawful enemy combatant and subsequently, a military tribunal is not an appropriate forum.[124]

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to have access to bin al-Shibh, another terrorist that is being detained, due to Moussaoui's contention that this man could exonerate him. National security did not appear to be an issue in deciding this ruling, which was appealed.

117. *See* Kelli Arena & Phil Hirshkorn, *Suspected Terrorist Wants to Fire His Lawyers*, April 22, 2002, *available at* http://www.cnn.com/2002/LAW/04/22/inv.moussaoui.hearing/index.html. Moussaoui, while in court, called for the destruction of the United States and Israel and reported that he was ready to fight for Allah against America.

118. Anderson, *supra* note 81.

119. *Id.* at 610.

120. Manual for Courts-Martial, United States, R.C.M. 203 (2000).

121. MacDonnell, *supra* note 89, at 19.

122. *Ex parte* Quirin, 317 U.S. 1 (1942).

123. MacDonnell, *supra* note 89, at 19.

124. Note, however, that absent congressional action or inaction, the President has the power

Article I, Section 8 of the Constitution gave Congress the power to create courts-martial and provide procedures for their operation.[125] Congress, through the creation of the Uniform Code of Military Justice, "established courts; defined their jurisdiction; identified crimes; delegated authority to create pre-trial, trial, and post-trial procedures; and created an appellate system."[126]

A person can be tried by a general courts-martial[127] for committing acts against laws of war.[128] If the President classifies an individual as an enemy combatant and a reviewing court, such as a FISA-like court, upholds this classification, the individual has been properly accused of violating the laws of war and should be tried by courts-martial.

A courts-martial offers similar due process protections as an Article III court; however, there is some question as to the system's impartiality, particularly since military judges do not have tenure and their promotions are dependent on their superior officers' reviews.[129] Therefore, since the President is the Commander in Chief of the Armed Forces, it is reasonable to question whether an American citizen labeled as an enemy combatant would have an independent review under this system or just a rubber stamped decision. Some of this concern, however,

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to try U.S. citizens that are engaged in belligerent acts of war. *Id.*

125. This power comes from the following text of Article I, Section 8: "The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces . . . ." *Id.*

126. *Id.* at 20. *See* Dynes v. Hoover, 61 U.S. 65 (1857) (confirming the constitutionality of courts-martial); Fedric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 635 (1994).

127. There are three types of courts-martial including: summary, special, and general courts-martial. Summary and special courts-martial are limited in the punishment they can order and in matters over which they can preside. The general courts-martial, which has jurisdiction over all military crimes and violations of the laws of war, can impose any punishment, including death. The accused in a general courts-martial has a choice between a bench trial or can be tried before five service members who serve as a panel which is presided over by a military judge. Lederer & Hundley, *supra* note 126, at 643.

128. Article 18 of the UCMJ allows courts-martial to try civilians that have been accused of violating the law of war. It states "general courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." MacDonnell, *supra* note 89, at 20 (citing UCMJ). Although some argue that *Ex Parte Milligan* provides that citizens cannot be tried by military tribunals when the civilian courts are open and functioning, the Supreme Court in *Ex Parte Quirin* distinguished the ability of the tribunal in that case to try an unlawful enemy combatant that was an American citizen. The Court stated that an individual that has associated with the enemy, is under the guidance of the enemy, and is planning to take positive action against our country cannot circumvent trial by military tribunal just because the individual is an American citizen. That person has participated in planning or performing belligerent acts against our country in violation of the laws of war, and appropriately, can be tried by a military tribunal or a courts-martial. *Id.* at 37.

129. *See* Lederer & Hundley, *supra* note 126.

has been diminished by the UCMJ prohibiting "[c]onvening authorities . . . from censuring, reprimanding or admonishing any court-martial member, military judge or counsel concerning that court's findings or sentence."[130]

Also, the courts-martial system has an appellate process that helps alleviate the concern of possible unlawful command influence. The Supreme Court has direct review over the decisions of the highest military appellate court.[131] The fact that appellate courts can make decisions de novo and the Supreme Court has the power to review the decisions of the military courts diminishes the impact of unlawful command influence, if such influence is utilized.

Also, trial by courts-martial allows classified information to be appropriately handled. Rule 505(a) of the Military Rules of Evidence provides: "Classified information is privileged from disclosure if disclosure would be detrimental to the national security."[132] Further, this information can be admitted into evidence without changing its classified status.[133] Therefore, a courts-martial affords the enemy combatant the greatest amount of procedural due process possible without compromising national security or classified information.

A courts-martial proceeding would provide the accused enemy combatant an opportunity to confront the evidence produced against him while protecting the national security interests of our government. While the courts-martial will allow some evidence to be heard, such as hearsay, that a civilian trial would exclude, the accused will have an opportunity to present a defense and confront the evidence against him.

## CONCLUSION

The war on terrorism has been a new frontier for all Americans. What was once thought impossible, the penetration of our boundaries by terrorists, has become a palpable reality. In order to deal with attacks against our country, the Constitution gave the President the power to act in a decisive manner. Further, the Constitution did not give the courts the power to determine if the President's actions were correct, only to determine if they were made pursuant to the Constitution. Due to the need for decisive action by the Executive branch and for the maximum security of our homeland, the President must be able to declare an individual an enemy combatant. However, when that person is a U.S. citizen

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130. Lieutenant James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231, 233 (1986).

131. "In enacting the Military Justice Act of 1983, 97 Stat. 1393, Congress for the first time in the history of American military law provided for direct Supreme Court review, by writ of certiorari, of certain decisions of the highest military tribunal." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 118 (8th ed. 2002).

132. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 505(a) (2000).

133. *Id.* However, the accused may or may not have access to the classified information. If the government maintains the accused cannot have access to the information, the judge must find that the "information is properly classified and that disclosure would be detrimental to the national security." MILITARY R. EVID. 505(c).

captured on American soil, there needs to be some limitations on the theoretical lifelong detention of this individual and their ability to have the President's determination reviewed. The President has the power to detain individuals such as Padilla for security reasons only, not for punishment. However, when the detainment lingers indefinitely, that detention becomes punishment. Therefore, Congress needs to act to establish a review process and to determine in what forum an enemy combatant should be tried. This Note provides a proposal, which requires the three branches of the federal government to act according to their constitutional duties, to protect American citizens' due process and the Nation's security.